Supreme Court, U.S
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No.
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In The

Supreme Court of the United States

R.W. DOCKS & SLIPS,

Petitioner,

v.

STATE OF WISCONSIN and WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Wisconsin

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Is the public trust doctrine a "background principle" of state property law as to always be a complete defense to a regulatory taking claim?

II.

Are individual condominium units to be regarded each as the relevant parcel in the "takings fraction," for purposes both of the categorical rule of *Lucas v. South Carolina Coastal Council* and the balancing test of *Penn Central Transportation Co. v. City of New York*?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS AND JUDGMENT BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AT ISSUE 2

STATEMENT OF THE CASE 2

A. INTRODUCTION 2

B. FACTUAL BACKGROUND 3

C. JUDICIAL BACKGROUND 7

REASONS FOR GRANTING THE WRIT 10

I.

A TAKING CAN OCCUR EVEN WHEN THE UNDERLYING REGULATORY ACTION IS BASED UPON THE PUBLIC TRUST DOCTRINE 10

II.

WHETHER THE REFUSAL TO ALLOW CONSTRUCTION OF 71 SEPARATE CONDOMINIUM UNITS IS A CATEGORICAL TAKING UNDER *LUCAS* OR PARTIAL TAKING UNDER *PENN CENTRAL* 17

CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES

Boston Waterfront Dev. Corp. v. Commonwealth, 393 N.E.2d 356 (Mass. 1979) 13

Concrete Pipe & Prods. v. Constr. Laborers Pension Trust, 508 U.S. 602 (1993) 21

East Cape May Associates v. New Jersey, 693 A.2d 114 (N.J. Super. 1997) 19

Eberle v. Dane County Bd. Of Adjustment, 227 Wis.2d 609, 595 N.W.2d 730 (1999) 17

Florida Rock Industries, Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994) 21

Gillen v. City of Neenah, 219 Wis.2d 806, 580 N.W.2d 628 (1998) 11

Good v. United States, 39 Fed. Cl. 81 (1997) 17

Illinois Central R.R. Co. v. Illinois, 146 U.S. 387 (1892) 13

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 17

Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470 (1987) 19

Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994) 19

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) ..... *passim*

McQueen v. South Carolina Coastal Council, 340 S.C. 65 (2000) 19

Muench v. Public Serv. Comm'n, 261 Wis. 492, 53 N.W.2d 514 (1952) 10, 12, 13

TABLE OF AUTHORITIES – Continued

Page

National Audubon Society v. Superior Court (Mono Lake), 658 P.2d 709 (Cal. 1983) 13

Oneida County v. Converse, 173 Wis.2d 78, 496 N.W.2d 124 (Ct. App. 1992)..... 11

Orion Corp. v. Washington, 747 P.2d 1062 (Wash. 1987), cert. denied, 486 U.S. 1022 (1988)..... 13

Palazzolo v. Rhode Island, 121 S.Ct. 2448 (2001) 15, 16, 17, 20, 21, 22

Palm Beach Isles Association v. United States, 208 F.3d 1374 (Fed. Cir. 2000)..... 16

Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978)..... *passim*

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 11, 14

R.W. Docks & Slips v. State, 2000 WI App. 183, 238 Wis.2d 182, 617 N.W.2d 519 (Ct. App. 2000) 1

R.W. Docks & Slips v. State, 2001 WI 73, 244 Wis.2d 497, 628 N.W.2d 781 (2001) 1, 7, 9, 17

R.W. Docks and Slips v. Department of Natural Resources, 145 Wis.2d 854, 429 N.W.2d 86 (Wis. App. 1988) 7

Sea Cabins on the Ocean v. City of North Myrtle Beach, 345 S.C. 418 (2001)..... 19

State v. Deetz, 66 Wis.2d 1, 224 N.W.2d 407 (1974) 11

TABLE OF AUTHORITIES – Continued

Page

State v. Trudeau, 139 Wis.2d 91, 408 N.W.2d 337 (1987) 11

Vermont v. Central Vermont Ry., 571 A.2d 1128 (Vt. 1989) 13

Volkema v. Department of Natural Resources, 542 N.W.2d 282 (Mich. App. 1996), cert. denied, 525 U.S. 1040 (1998) 19

Zealy v. City of Waukesha, 201 Wis.2d 365 N.W.2d 528 (1996) 17

CONSTITUTIONS

U.S. Const. amend. V 2, 8, 9, 21

U.S. Const. amend. XIV 2, 8

Wis. Const. Art. IX, sec. 1 ..... 2, 12

Wis. Const. Art. I, sec. 13 8

STATUTES

28 U.S.C. § 1257(a) 1

OTHER AUTHORITIES

John E. Fee, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. CHI. L. REV. 1535, 1557 (1994) 19

Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971) 13

Takings and the Police Power, 74 YALE L.J. 36 (1964) 13

PETITION FOR WRIT OF CERTIORARI

R.W. Docks and Slips respectfully petitions for a writ of certiorari to review a decision of the Supreme Court of the State of Wisconsin.

OPINIONS AND JUDGMENT BELOW

The opinion of the Supreme Court of Wisconsin is reported as *R.W. Docks & Slips v. State*, 2001 WI 73, 244 Wis.2d 497, 628 N.W.2d 781 (2001). The opinion is reproduced and attached to this petition as Appendix pages 1-17. (App. 1-17)

The decision of the Wisconsin Court of Appeals is reported as *R.W. Docks & Slips v. State*, 2000 WI App. 183, 238 Wis.2d 182, 617 N.W.2d 519 (Ct. App. 2000); it is reproduced and attached as Appendix pages 18-24. (App. 18-24) The decision of the Bayfield County Circuit Court (Wisconsin) is unpublished. The Circuit Court Order and Judgment and a partial transcript of the Decision is reproduced and attached as Appendix pages 25-31. (App. 25-31)

JURISDICTION

The judgment of the Wisconsin Supreme Court was filed on June 28, 2001. (App. 1) That decision was a final judgment not subject to further review by any court save the Supreme Court of the United States. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part: "nor shall private property be taken for public use without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

Article IX, sec. 1 of the Wisconsin Constitution adopts verbatim the Northwest Ordinance of 1787 and provides: "The state shall have concurrent jurisdiction on all rivers and lakes bordering on this state so far as such rivers or lakes shall form a common boundary to the state and any other state or territory now or hereafter to be formed, and bounded by the same; and the river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost or duty therefore." (This provision is commonly referred to as the *Public Trust Doctrine*.)

STATEMENT OF THE CASE

A. INTRODUCTION

The Petitioner, R.W. Docks & Slips ("R.W. Docks" or "Docks") is a general partnership in the business of developing recreational marinas. (App. 3) In 1969, R.W. Docks began the development of Port Superior Marina in

Bayfield, Wisconsin. The marina was designed to be a deep water sailboat harbor consisting of 272 boat slips with associated on-land infrastructure. (App. 32-34)

The marina and infrastructure were built with the approval of the Army Corps of Engineers and the Wisconsin Department of Natural Resources (DNR). (App. 32-34) As the marina development neared completion, R.W. Docks needed a final dredging permit to facilitate construction of the last 71 slips. (App. 3-4)

After eighteen years of cooperation, the Wisconsin Department of Natural Resources denied the final permit in order to protect a small emergent weed bed that had grown behind the breakwater. (App. 35; App. 3-4) The subject weed bed would never have grown except for the sheltering effect of the breakwater built by R.W. Docks and approved by the DNR. (App. 1-2) Thereafter, R.W. Docks brought an inverse condemnation action against the State of Wisconsin and the Wisconsin Department of Natural Resources.

Under the guise of the public trust doctrine, the courts of the State of Wisconsin held that R.W. Docks does not have a cognizable property interest which can be unconstitutionally taken. (App. 12) As a result, the public has gained the benefit of one acre of aquatic vegetation at the expense of more than one million of R.W. Dock's dollars.

B. FACTUAL BACKGROUND

1. This matter arises from a Wisconsin trial court decision granting summary judgment in favor of the

Respondents, State of Wisconsin and the Wisconsin Department of Natural Resources (DNR). The relevant facts are undisputed. (App. 3) An illustration depicting Port Superior Marina is reproduced in the Appendix at page 37. The shaded areas on Docks #4 and #5 consist of the 71 boat slips which are the subject of the petitioner's claim. (App. 37) With the exception of shaded areas on Docks #4 and #5, all depicted structures are currently in existence. (App. 3; 32-35)

2. In 1968, R.W. Docks applied to the Army Corps of Engineers for a permit to construct a breakwater and boat harbor in Pikes's Bay of Lake Superior in Bayfield, Wisconsin. (App. 33) At the same time R.W. Docks applied to the DNR for a permit to construct a breakwater and boat harbor, the DNR was fully apprized of the plaintiff's plan to install sailboat docks in the entire sheltered area. (App. 33) In 1969, the DNR granted the plaintiff a permit to construct a breakwater sufficient to provide a protected harbor for a marina. (App. 33) The Army Corps of Engineers also granted the necessary permit for the construction of the breakwater and boat harbor. (App. 33) Thereafter, construction of the marina moved steadily forward. As needed, R.W. Docks applied to the Wisconsin DNR for a contract to dredge material from the bed of Lake Superior. (App. 35)

The initial construction phase consisted of the breakwater, four and one half docks containing 201 boat slips, a legislated shoreline (seawall), a lagoon, pool, racquet club, tennis court, wells and water system, sewage treatment plant, lift station and sewer laterals and connections. (App. 33-34) Docks invested heavily in this infrastructure to build a marina capable of supporting

272 deep water sailing vessels. (App. 34) R.W. Docks planned to recover the cost of these investments by developing and selling the entire 272 boat slips. (App. 34)

In 1971, during the construction phase, a dispute ensued between the plaintiff and the DNR over whether the lagoon was located upland or on the lake bed. (App. 33-34) R.W. Docks assumed the lake's natural shoreline was the actual shoreline, while the DNR asserted that the actual shoreline was located somewhere inland of the natural shoreline. This dispute jeopardized the construction of Docks #4 and #5. (App. 33-34)

In resolving the dispute, R.W. Docks explained that it was necessary to own land abutting the planned positioning of docks #4 and #5 in order to complete construction of the marina. (App. 33-34) Therefore, the DNR agreed to allow R.W. Docks to construct a legislated shoreline in the upland area north of the lagoon and a quay, south of the lagoon, on the lake bed which would facilitate access to docks #4 and #5. (App. 33-34) The purpose of the quay was to secure and provide access to docks #4 and #5. (App. 33-34)

3. In 1977, the marina was converted to a condominium under Wisconsin law and recorded in the Bayfield County Register of Deeds. (App. 34; App. 38-44) A partial reproduction of the Condominium Association documents are attached to this petition as Appendix pages 38-44. The entire document is part of the lower court record and is a public document accessible through the Bayfield County Wisconsin Register of Deeds volume 307 of Records, pages 337-429.

The condominium units consist of 272 separate and distinct boat slip units which includes the 71 slips at issue. (App. 44) Each condominium unit was numbered, 1-272, and consisted of a floating boat slip and an undivided interest in the common areas and marina facilities. (App. 38-44) Two hundred and one of the units were developed and sold prior to the DNR's denial of the permit necessary to complete the remaining 71 units on docks #4 and #5. (App. 34)

4. The initial revenue from the sale of the first 201 units was used to pay for the breakwater, the existing docks and the on-land infrastructure. (App. 34) However, the revenue from these 201 units was not sufficient to recapture the costs incurred in constructing the marina. (App. 34) R.W. Docks, to date, has lost in excess of one million dollars on the marina development. (App. 34) The remaining 71 units have a combined value of approximately $1.5 million. (App. 35)

Port Superior Marina was developed on an incremental basis as demand for units warranted. For a period of eighteen years, R.W. Docks would apply to the Army Corps of Engineers for a permit to dredge and construct floating docks and then, after receiving the federal permit, contract with DNR to remove materials from the lake bed. (App. 35; App. 3)

The DNR would routinely enter contracts with the plaintiff for dredging which required only a nominal cash payment, posting of a bond, and a proper disposal of dredging spoils. (App. 35) The plaintiff complied with this regulatory scheme and relied on it in the development of the marina. (App. 35).

In 1983, Docks applied to the DNR to dredge 20,000 cubic yards of material from the lake bed to facilitate the completion of docks #4 and #5. Docks #4 and #5 were to be anchored on the quay pursuant to the 1971 agreement with the DNR. (App. 33-34) In a departure from its previous practice, the DNR, in 1986, refused to allow the requested dredging. (App. 3; App. 35)

C. JUDICIAL BACKGROUND

1. This present litigation arises from the DNR's 1986 denial of the final permit necessary to complete the marina. The basis for the DNR's refusal was that the dredging would result in the destruction of a small emergent weed bed that came into existence as a result of the calming effect of the breakwater constructed by R.W. Docks. (App. 1) But "[T]he small emergent weed bed would not have 'emerged' at all were it not for the calming effect of a breakwater the developer had built in the early stages of the project. The presence of the emergent weed bed prompted the DNR to block the developer's construction of the last set of boat slips in the marina . . . " (App. 1-2; *R.W. Docks & Slips v. State*, 2001 WI 73, 244 Wis.2d 497, 628 N.W.2d 781 (2001)).

In a previous action, R.W. Docks appealed the DNR's 1986 denial. After a series of exhaustive administrative appeals, Wisconsin Circuit Court reviews and a Wisconsin Court of Appeals' decision, *R.W. Docks and Slips v. Department of Natural Resources*, 145 Wis.2d 854, 429 N.W.2d 86 (Wis. App. 1988), R.W. Docks was ultimately and finally denied the necessary dredging permit which

would facilitate the construction of the final 71 slips. (App. 4)

2. On January 4, 1999, the plaintiff filed this present inverse condemnation action in Bayfield County, Wisconsin, alleging a taking of property without just compensation in violation of Article I, sec. 13 of the Wisconsin Constitution and the Fifth and Fourteenth Amendment of the Constitution of the United States. (App. 25)

On March 18, 1999, the Respondents, State of Wisconsin and Wisconsin Department of Natural Resources filed a motion for summary judgment seeking dismissal of the complaint. (App. 25) On October 19, 1999, the Bayfield County Circuit Court granted summary judgment in favor of the State and DNR. (App. 25-31) The Circuit Court held that the denial of the permit was not an unconstitutional taking because: 1) the right to build the additional boat slips was not part of the plaintiff's title pursuant to the public trust doctrine; 2) even if the plaintiff had a property right, such right was subject to the public trust doctrine; and 3) the plaintiff retained considerable practical use of the property and there is no evidence showing adverse economic impact resulting from state action. (App. 4, 25-30)

3. R.W. Docks filed a timely appeal to the Wisconsin Court of Appeals. (App. 18) That court affirmed, stating that Docks maintained the benefit of all or substantially all of its property. In addition, the Court of Appeals concluded that Docks assumed the risk of loss inherent in commencing a project without all necessary permits, and thus did not suffer a taking of property.

4. R.W. Docks' timely petition for review to the Wisconsin Supreme Court was accepted and on June 28, 2001, the Supreme Court of Wisconsin affirmed the lower court's decision. *R.W. Docks & Slips v. State*, 2001 WI 73, 244 Wis.2d 497, 628 N.W.2d 781 (2001). While recognizing that private property can be subject to a regulatory taking, the Wisconsin high court concluded that there are only two types of regulatory takings: those which result in some sort of "physical invasion" of private property and those which deny "all economically beneficial or productive use of land." (App. 7) Observing that R.W. Docks was not physically invaded by any regulation and that Docks still had 201 of the 272 slips, the court concluded there was no categorical taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). (App. 7)

Next, the Wisconsin Supreme Court turned to the question of whether R.W. Docks had been subjected to a regulatory taking under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). However, before proceeding to this inquiry the court addressed the question of whether Docks had any property interest deserving of protection under the Fifth Amendment and the Wisconsin Constitution. The court noted that if Docks had no private property right, it can not have suffered an unconstitutional taking. (App. 8) While recognizing that the public trust doctrine originally existed to protect commercial navigation, the court concluded that R.W. Docks does not have a private property right because Wisconsin has "expansively interpreted [the public trust doctrine] to safeguard the public's use of navigable water for purely

recreational purposes such as boating, swimming, fishing, hunting, recreation and to preserve scenic beauty." (App. 10) The Wisconsin Supreme Court recognized that R.W. Docks does have property rights as a riparian but concluded that all such rights are subordinate to the public trust doctrine insofar as the State sees fit to expand, interpret, develop and apply the doctrine to private riparians. Thus, the court held: "Docks has failed to demonstrate a compensable regulatory taking under *Penn Central*." (App. 12)

REASONS FOR GRANTING THE WRIT

I.

A TAKING CAN OCCUR EVEN WHEN THE UNDERLYING REGULATORY ACTION IS BASED UPON THE PUBLIC TRUST DOCTRINE.

The Wisconsin Supreme Court has held that a riparian property owner can never suffer a *Penn Central* taking of his riparian rights if the governmental action is exercised pursuant to the public trust doctrine. (App. 12) Implicitly and logically it must be concluded that the Wisconsin high court decision also applies to categorical takings under *Lucas*. As the court aptly noted, if there is no private property right there can not be an unconstitutional taking. (App. 8)

1. As with many states of the Union, the public trust doctrine developed in Wisconsin as a concept which provides that the state holds beds underlying navigable waters in trust for all Wisconsin citizens. *Muench v. Public Serv. Comm'n*, 261 Wis. 492, 501-02, 53 N.W.2d 514 (1952).

The public trust doctrine, in itself, does not create legal rights, it "merely establishes standing for the state, the ability to vindicate the public trust, to assert a cause of action recognized by the existing law of Wisconsin." *State v. Deetz*, 66 Wis.2d 1, 13, 224 N.W.2d 407, 413 (1974). Originally designed to protect commercial navigation, the doctrine has been expanded to safeguard the public's use of navigable waters for enjoyment of natural scenic beauty, as well as for recreational and nonpecuniary purposes. *See State v. Trudeau*, 139 Wis.2d 91, 104, 408 N.W.2d 337 (1987); *Gillen v. City of Neenah*, 219 Wis.2d 806, 820, 580 N.W.2d 628, 633 (1998). From there it grew to public control of boating, swimming, fishing, hunting, and preservation of scenic beauty. *Oneida County v. Converse*, 173 Wis.2d 78, 83, 496 N.W.2d 124, 126 (Ct. App. 1992). And, in the present matter, the public trust doctrine was extended to enable the requisition of private property in order to protect aquatic vegetation.

With such a historical application it is obvious that this doctrine gives the state the power to regulate navigable waters. To that end, R.W. Docks never questioned the State's right, through the DNR, to regulate. However, the question is not whether the DNR has the power to regulate but, rather, has the exercise of that regulation gone "too far." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). Indeed, in view of the decision below, the real question is whether any regulation can ever go too far? Under the Wisconsin Supreme Court's analysis of relevant takings and public trust doctrines, it can not. This Petition thus raises the critical issue of whether the public trust doctrine serves as a blanket immunity for states'

liability under the just compensation guarantee of the federal Constitution.

A detailed analysis of the historic origins of the public trust doctrine is, obviously, beyond the scope of this Petition. But some recitations are required, if only for the purpose of indicating the wide ambit of effect the Wisconsin Supreme Court's decision will have, if left unreviewed. In 1784, Virginia authorized the ceding of the Northwest territory to the Confederation upon two conditions: 1) the new states admitted to the Federal Union were to have the same sovereign rights as the original states; and 2) the navigable waters flowing into the Mississippi and the St. Lawrence rivers, and the connecting water ways were to be forever free public highways. These conditions were incorporated into the Northwest Ordinance of 1787 which provided for the government of the Northwest Territory. *Muench v. Public Service Commission*, 261 Wis. 492, 499, 53 N.W.2d 514, 516 (Wis. 1952).

Article IX, sec. 1 of the Wisconsin Constitution, incorporates verbatim the wording of the Northwest Ordinance with respect to navigable waters. The provision provides:

> "The state shall have concurrent jurisdiction on all rivers and lakes bordering on this state so far as such rivers or lakes shall form a common boundary to the state and any other state or territory now or hereafter to be formed, and bounded by the same; and the river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United

States, without any tax, impost or duty therefore." *Id.* at 261 Wis. 499-500, 53 N.W.2d 514, 516.

A number of jurisdictions have relied on the public trust doctrine as a categorical exclusion of governmental regulation from the ambit of the Takings Clause. Whether the doctrine is viewed as an historic artifact of the Northwest Ordinance (affecting only the common law of property in Illinois, Indiana, Wisconsin, Michigan and Minnesota), or a wider concept that is in force in every state of the Union, it is clear that it has been employed as a means of evading this Court's takings jurisprudence. *See Orion Corp. v. Washington*, 747 P.2d 1062, 1072 (Wash. 1987), cert. denied, 486 U.S. 1022 (1988); *Boston Waterfront Dev. Corp. v. Commonwealth*, 393 N.E.2d 356, 369 (Mass. 1979); *Vermont v. Central Vermont Ry.*, 571 A.2d 1128, 1135 (Vt. 1989); *National Audubon Society v. Superior Court (Mono Lake)*, 658 P.2d 709, 723 (Cal. 1983). *See also*, Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971); *Id., Takings and the Police Power*, 74 YALE L.J. 36 (1964). This is despite the fact that in what is the *locus classicus* of federal recognition of the doctrine, *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387 (1892), this Court was careful to hold that states are still obligated under the Just Compensation guarantee for certain regulatory actions. *See Id.* at 455.

2. Likewise, in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), this Court held that a categorical taking must be compensated unless the State regulation is one which prohibits a use which was never a part of the land owner's title to begin with. *Id.* at 1027. In other

words, if the State imposed restriction prohibited something that was prohibited by the "background principles" of state law or inherently noxious or a nuisance then no taking could be realized. *Id.* at 1029.

Seizing on this concept, the State of Wisconsin concluded that because the public trust doctrine is so long acquiesced as to become a rule of property, then any regulation perpetuated under that doctrine is, inherently, a noncompensable taking under *Lucas*. (App. 12) No heed is given to the fact that any such restrictive regulation was never "part of the title." The only necessary inquiry is whether the regulation was brought to life under the umbrella of the public trust doctrine. (App. 12) Likewise, the Wisconsin Supreme Court's analysis gives no recognition to the fact that the specific regulation itself was never part of a *background principle* or that the proposed use, at least in the present matter, was not noxious.

In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), this Court stated that while property can be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. But if the Wisconsin Supreme Court is to be credited, regulations promulgated under a public trust doctrine can never go too far because all such regulations, regardless of when or how they are applied, relate back to an organic law of state property. (App. 12) The narrowly-drawn exception in *Lucas* to categorical compensable takings made in accordance with "background rules" of state property law, has thus been vastly expanded by the Wisconsin Supreme Court into a hard and fast rule which is applicable without regard to factual or individual nuances of each particular regulatory action.

3. Similarly, Wisconsin courts are now able to dismiss any takings claim under *Penn Central*, 438 U.S. at 124, 127, 130 n.27. No riparian owner can ever have reasonable investment-backed expectations because his property rights are forever subordinate to the public trust doctrine and, therefore, all regulatory action exercised under its guise should have been anticipated by the riparian. As noted by the Wisconsin Supreme Court: "Assuming that riparian rights, subordinate as they are to the rights of the pubic, are included in the 'bundle of rights' recognized as private property for the purposes of Fifth Amendment taking analysis, Docks has failed to demonstrate a compensable taking under *Penn Central*." (App. 12)

Under the Wisconsin Supreme Court's approach, quick work can be made of takings claims under *Penn Central* because the *ad hoc* inquiry concerning the character of the governmental action, the economic impact of the regulation on the claimant and the extent to which the regulation interfered with distinct investment-backed expectations need never be reached. (App. 12); *Penn Central*, 438 U.S. 104, 124. "If there is no private property right there can not be an unconstitutional taking." (App. 8).

4. The Wisconsin Supreme Court's mis-step is analytically similar to the pathology of the Rhode Island Supreme Court's decision reviewed by this Court in *Palazzolo v. Rhode Island*, 121 S.Ct. 2448 (2001), which, incidently, was decided on the same day the Wisconsin Supreme Court decided the present matter. *Id.* It appears the Wisconsin courts have merely shadowed the Rhode Island concept in *Palazzolo* that a regulation in existence

prior to private ownership of property can never rise to the level of a taking. Wisconsin has simply added a new twist: the regulation need not predate the property interest so long as the regulation is promulgated under the public trust doctrine which, obviously, did predate the property interest.

In this respect, a large portion of the present question may have been addressed in *Palazzolo v. Rhode Island*, but the guidance of that decision was unavailable to the Wisconsin high court. It seems unlikely, though, that Wisconsin would have reached a different conclusion even with the benefit of the *Palazzolo* decision. Given its belief that the public trust doctrine establishes a supra-constitutional regulatory power, the Wisconsin Court's decision can not be wholly resolved by *Palazzolo*. So while Petitioner would not be adverse to this matter being GVR'ed in light of the *Palazzolo* decision, it is cognizant that the issues raised here may well require plenary review by this Court.

5. In addition to the foregoing reasons, this writ should be accepted because the Wisconsin decision is in conflict with court rulings in other navigable servitude cases. *In Palm Beach Isles Association v. United States*, 208 F.3d 1374, 1385 (Fed. Cir. 2000), it was held that in order to use a navigational servitude to avoid paying compensation the government needs to show that regulatory restriction was for a purpose related to navigation. *Id.* at 1385. Here, the Wisconsin regulation had nothing to do with navigation.

Assuming that the public trust doctrine is no more than what it was intended to be – a restriction on the

State's ability to hinder commercial navigation – then the Wisconsin decision is also in conflict with this Court's decision in *Kaiser Aetna v. United States*, 444 U.S. 164, 172 (1979) in which it was stated: "this Court has never held that the navigational servitude creates a blanket exception to the Takings Clause." *See also, Good v. United States*, 39 Fed. Cl. 81 (1997).

6. As a consequence of its application of the public trust doctrine, Wisconsin has created a rule which wholly abrogates traditional takings analysis. In *Penn Central*, this Court held that in takings law it is best to avoid any "set formula" and it is better to engage in individual "ad hoc" factual inquiries as warranted by each case. *Penn Central*, 438 U.S. at 124. In *Palazzolo*, this court flatly rejected the idea that a sweeping doctrine can eviscerate the need for each case to be analyzed under its own factual background. Here, too, it is necessary that this court address the question of whether the public trust doctrine, as applied in Wisconsin, is wholly free of Fifth Amendment limitations as developed under *Lucas*, *Penn Central* and their progeny.

II.

WHETHER THE REFUSAL TO ALLOW CONSTRUCTION OF 71 SEPARATE CONDOMINIUM UNITS IS A CATEGORICAL TAKING UNDER *LUCAS* OR PARTIAL TAKING UNDER *PENN CENTRAL*

1. According to its decisions in *R.W. Docks & Slips v. State*, 2001 WI 73, 244 Wis.2d 497, 628 N.W.2d 781 (2001); *Zealy v. City of Waukesha*, 201 Wis.2d 365, 548 N.W.2d 528 (1996) and *Eberle v. Dane County Bd. Of Adjustment*, 227

Wis.2d 609, 595 N.W.2d 730 (1999), the Wisconsin Supreme Court appears not to recognize partial regulatory takings. Wisconsin recognizes only "two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint." (App. 7) *citing, Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1015 (1992). Accordingly, Wisconsin recognizes that the first type of categorical taking involves a regulatory action that brings about an actual physical "invasion" of private property. *Id.* The second type involves regulatory actions that deny "all economically beneficial or productive use of land." *Id.*

Here, however, the Wisconsin Supreme Court concluded that because R.W. Docks has 201 of the intended 272 boat slips, Docks retained all or substantially all practical uses of its property. (App. 7) Disposing thus with R.W. Docks' claim that he had suffered a total or categorical taking under *Lucas,* the court proceeded to conclude that Docks did not actually have any property rights which could be unconstitutionally deprived and, therefore, Docks could not have suffered a taking under *Penn Central* either.

For some reason the court then proceeded with a discussion of the *Penn Central* factors. (App. 15-17) Yet, given the Wisconsin Supreme Court's conclusion that no categorical taking had occurred, what would be the point of a *Penn Central* analysis when the Wisconsin courts do not recognize that a non-physical regulatory action can result in anything less than a categorical taking? In this respect, Wisconsin jurisprudence tracks a number of jurisdictions which appear to reject even the possibility of

partial regulatory takings, and which have prescribed narrowing constructions of the "relevant parcel" being taken by regulation. *See, e.g., McQueen v. South Carolina Coastal Council*, 340 S.C. 65 (2000), vacated and remanded, 121 S.Ct. 2581 (2001); *Sea Cabins on the Ocean v. City of North Myrtle Beach*, 345 S.C. 418 (2001); *East Cape May Associates v. New Jersey*, 693 A.2d 114 (N.J. Super. 1997); *Volkema v. Department of Natural Resources*, 542 N.W.2d 282 (Mich. App. 1996), cert. denied, 525 U.S. 1040 (1998); *see also*, John E. Fee, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. CHI. L. REV. 1535, 1557 (1994).

2. These issues were well-articulated in *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994), where it was asked whether the plaintiff could maintain a taking claim under circumstances where he was precluded, by regulation, from developing only a portion of his property. *Loveladies* at 1179-80. In a footnote, the Wisconsin Court declined Petitioner's "invitation to follow the lead" of *Loveladies*. (App. 15, n.5) The problem with this footnote does not arise so much from the spurned invitation as it does from the Court's rejection of the idea that a compensable taking can result from something less than a total wipe-out of the property owner's value. *See, Lucas* at 1019 n.8 (whether a loss of some but not all economic use can result in a compensable taking). And, as noted by this Court in *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 497 (1987), "our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, [and] one of the critical questions is determining how to define the unit of property whose value is to furnish the denominator of the fraction."

The *Penn Central* analysis is intrinsically bound-up with partial regulatory takings. "[W]here a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action." *Palazzolo*, 121 S.Ct. at 2457. The analytical process set forth in *Penn Central* enables courts to decide on an ad hoc basis whether a partial taking has occurred. But the Wisconsin Supreme Court trivializes the *Penn Central* analysis by simply holding that there are no partial regulatory takings. (App. 13-14)

3. A related question raised in this petition is whether R.W. Docks' remaining 71 slips and the infrastructure associated with those slips should be viewed as individual separate pieces of property. Docks asserted, but the lower courts did not resolve, the fact that each unit is a separate parcel pursuant to the condominium declaration. (App. 34, 38-44) Likewise, the courts did not recognize that R.W. Docks sold the original 201 slips prior to the 1986 regulatory action. (App. 34; App. 7)

If the remaining 71 slips are viewed as separate from the first 201 slips then there should be no doubt that Docks has stated a valid claim for a categorical total taking under *Lucas*. Each slip is a separate and distinct parcel of real estate under Wisconsin condominium law. Each slip is a condominium unit which consists of a place on the surface of the lake and an undivided interest in the common on-land infrastructure. (App. 38-44) The removal of any one of the existing 201 slips would be a

total deprivation of that property owner's interest in his or her property. Likewise, the refusal to allow the construction of the final 71 slips is a total deprivation of 71 distinct property interests which are completely separate from the original 201.

4. The conundrum raised by the Wisconsin Supreme Court's rationale needs to be resolved here because it is at odds with the underlying purpose for the *Penn Central* analysis. "To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question." *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 644 (1993). The rule of law is, and has been, as stated in *Palazzolo*: "Our polestar instead remains the principles set forth in *Penn Central* itself and our other cases that govern partial regulatory takings. Under these cases, interference with investment-backed expectations is one of a number of factors that a court must examine." *Palazzolo*, 121 S.Ct. at 2466. Wisconsin's rejection of Petitioner's "invitation" to apply these principles is deserving of this Court's attention.

Nothing in the language of the Fifth Amendment compels a court to find a taking only when the Government divests the total ownership of the property; the Fifth Amendment prohibits the uncompensated taking of private property without reference to the owner's remaining property interests. *Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560, 1568 (Fed. Cir. 1994). This Petition thus raises the question unsuccessfully mooted in *Palazzolo*. In that decision, the Court properly regarded

the question of determining the "denominator in the takings fraction" as "difficult" and "persisting." 121 S.Ct. at 2465. Unlike in *Palazzolo*, these arguments were "pressed" below in the state courts, although by no means satisfactorily resolved.

CONCLUSION

At stake in this Petition is nothing less than the integrity of this Court's takings jurisprudence. This is true in respect not only of delimiting "background principles" of state property law that can sweepingly defeat all regulatory takings claims, but also determining the relevant parcel for purposes of both *Lucas'* categorical taking rule and *Penn Central's* balancing test. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN SUPREME COURT

2001 WI 73

NOTICE

This opinion is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 99-2904

STATE OF WISCONSIN

R.W. Docks & Slips,

Plaintiff-Appellant-Petitioner,

v.

State of Wisconsin and Wisconsin Department of Natural Resources,

Defendants-Respondents.

(FILED JUN. 28, 2001)

REVIEW of a decision of the Court of Appeals. *Affirmed.*

¶ 1 DIANE S. SYKES, J. This case pits a small emergent weedbed along the shores of Lake Superior in Bayfield, Wisconsin, against the developer of a private marina on those same shores. The Wisconsin Department of Natural Resources sided with the weedbed, and denied the developer a dredging permit needed to complete the final phase of the marina development. The case has an ironic twist: the small emergent weedbed would not have "emerged" at all were it not for the calming effect of a

breakwater the developer had built in the early stages of the project. The presence of the emergent weedbed prompted the DNR to block the developer's construction of the last set of boat slips in the marina, 71 out of a total of 272 slips.

¶ 2 So the developer took the DNR to court, alleging a regulatory taking without just compensation. The case was dismissed on summary judgment, and the court of appeals affirmed, concluding that because the developer retained the benefit of all or substantially all of its property – including over 200 boat slips and various recreational facilities associated with the marina onshore – the denial of a permit for the construction of the remaining boat slips was not an unconstitutional taking.

¶ 3 We affirm. As takings law has evolved, there is no compensable categorical taking unless the regulatory action in question deprives a property owner of all economically beneficial use of his property. We do not perform the analysis piecemeal, but, rather, consider the property as a whole in order to determine the extent of the deprivation. Because the denial of the dredging permit did not deny the marina developer all economically beneficial use of its property, there was no categorical regulatory taking.

¶ 4 Further, and again considering the property as a whole, the regulatory action in this case at most affected only the developer's riparian right of reasonable access to the lake, which is subordinate to the public trust doctrine. Therefore, the DNR's action did not so severely impact or interfere with the developer's reasonable investment

expectations as to constitute an unconstitutional taking under traditional, ad hoc takings analysis.

I

¶ 5 The relevant facts are undisputed. R.W. Docks, a general partnership in the business of developing marinas, is the riparian owner of 1100 feet of frontage along Lake Superior in Bayfield, Wisconsin. In 1969, Docks began building a marina, called Port Superior, on this lake frontage land. At the outset, Docks sought and obtained permits from the DNR and the Army Corps of Engineers to construct a breakwater and boat harbor in connection with the marina development.

¶ 6 The marina was then built in stages. The initial phases of the project consisted of the breakwater, several docks eventually containing 201 boat slips, a sea wall, a lagoon, a solid pile quay structure placed on the lakebed, a port, racquetball club, tennis court, and supporting infrastructure. Throughout the gradual development of the marina, Docks sought and received the necessary permits from the DNR, including dredging permits pursuant to Wis. Stat. § 30.20.

¶ 7 In 1977, Docks converted the marina into condominiums. The 201 condominium boat slips, each of which included an undivided interest in the common areas of the marina facilities, were developed and sold before Docks obtained the necessary permits to complete construction of the final 71 boat slips at the marina.

¶ 8 In 1983, Docks applied to the DNR for a permit to dredge 20,000 cubic yards of material from the lakebed,

a necessary prerequisite to the completion of the remaining 71 boat slips. The DNR, after expressing concern over the environmental impact of the dredging, divided the application in two, the first to remove 5,000 cubic yards, and the second to remove 15,000 cubic yards of lakebed material. The DNR then granted the first dredging permit. In 1986, the DNR denied the second, larger dredging permit, and without the permit, the final 71 boat slips could not be built.

¶ 9 The permit was denied primarily because a small emergent weedbed had developed near the shore within the marina as a result of the sheltering effect of the breakwater that Docks had built. Weedbeds, evidently, are good for many things, including the proliferation of game fish, forage fish and associated macroinvertebrates and zooplankton, and so the DNR acted to protect this environmentally sensitive natural resource.

¶ 10 After exhausting available administrative appeals and judicial review of the DNR's action, Docks sued the DNR in circuit court alleging an unconstitutional taking of its property without just compensation. The Bayfield County Circuit Court, the Honorable Thomas J. Gallagher, granted the DNR's motion for summary judgment, concluding that: (1) Docks did not have a recognizable property interest in the 71 undeveloped boat slips; (2) even if Docks had a recognizable property interest in the 71 undeveloped boat slips, there was no unconstitutional taking because its riparian right to construct structures on the bed of Lake Superior was subject to the public trust doctrine; and (3) there was no unconstitutional taking because Docks retained considerable practical use of the property.

¶ 11 The court of appeals affirmed only the last conclusion of the circuit court, refraining from addressing the alternate arguments. The court of appeals agreed that the denial of the final dredging permit did not constitute a regulatory taking because Docks maintained the benefit and use of all or substantially all of its marina property. Furthermore, the court concluded that Docks assumed the risk inherent in commencing the project without all necessary permits, and therefore any economic loss it suffered as a result of the inability to build the last 71 slips could not be transferred to the State on a regulatory takings theory. We accepted review.

II

¶ 12 We review a circuit court's decision granting or denying a motion for summary judgment independently, using the same methodology as the circuit court. *Wisconsin Dep't of Corrections v. Kliesmet*, 211 Wis. 2d 254, 259, 564 N.W.2d 742 (1997); Wis. Stat. § 802.08(2). "[S]ummary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Kenefick v. Hitchcock*, 187 Wis. 2d 218, 224, 522 N.W.2d 261 (Ct. App. 1994).

¶ 13 The issue in this case is whether the DNR's denial of the final dredging permit constituted a regulatory taking of Docks' property without just compensation. This is also a question of law that we review without deference to the lower courts. *Zealy v. City of Waukesha*, 201 Wis. 2d 365, 372, 548 N.W.2d 528 (1996). The Fifth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment,

provides that private property shall not "be taken for public use, without just compensation." Article I, Section 13 of the Wisconsin Constitution provides that "[t]he property of no person shall be taken for public use without just compensation therefor." We have stated that:

> Takings jurisprudence has developed from two competing principles: on one hand, respect for the property rights of individuals; on the other, recognition that the government retains the ability, in furtherance of the interests of all citizens, to regulate an owner's potential uses of land. Thus, in *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926), the United States Supreme Court held municipal zoning to be a permissible exercise of the police power, while in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 159-60, 67 L.Ed. 322 (1922), the Court held that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Such takings are described as "constructive" or "regulatory" takings.

Zealy, 201 Wis. 2d at 373.

¶ 14 "A 'taking' need not arise from an actual physical occupation of land by the government." *Eberle v. Dane County Bd. of Adjust.*, 227 Wis. 2d 609, 621, 595 N.W.2d 739 (1999). If a regulatory restriction or action of the government deprives a property owner of all economically beneficial use of his property, there has been a categorical regulatory taking subject to compensation. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992); *Zealy*, 201 Wis. 2d at 374-75.

¶ 15 In determining whether a regulatory restriction "goes too far" for purposes of the Fifth Amendment, the United States Supreme Court has generally "eschewed any 'set formula' for determining how far is too far, preferring to 'engag[e] in . . . essentially ad hoc, factual inquiries." *Lucas*, 505 U.S. at 1015 (citing *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)); *Zealy*, 201 Wis. 2d at 373. However, the Supreme Court has recognized "at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint." *Lucas*, 505 U.S. at 1015. The first includes regulatory actions that bring about some form of physical "invasion" of private property. *Id.* The second includes regulatory actions that deny "all economically beneficial or productive use of land." *Id.* We have in Wisconsin interpreted this latter category to include regulatory actions that "deny the landowner all or substantially all practical uses of a property." *Eberle*, 227 Wis. 2d at 622; *Zealy*, 201 Wis. 2d at 374.

¶ 16 The DNR's denial of the dredge permit in this case did not bring about a physical invasion of private property. Nor did it deny Docks all economically beneficial or productive use of its property, or substantially all practical use of its property, inasmuch as it retained the economic benefit and use of the 201 boat slips and related recreational facilities at the marina. Accordingly, there has been no categorical regulatory taking under *Lucas* and *Zealy*.

¶ 17 We are left, then, with the ad hoc factual, traditional takings inquiry of *Penn Central* and *Zealy*. This involves an analysis of the nature and character of the

governmental action, the severity of the economic impact of the regulation on the property owner, and the degree to which the regulation has interfered with the property owner's distinct investment-backed expectations in the property. *Zealy*, 201 Wis. 2d at 374 (citing *Penn Cent.*, 438 U.S. at 124).

¶ 18 But first there is a threshold question, and that is the nature and extent of the private property interest at stake here. This case involves riparian rights, which are subject to and limited by the public trust doctrine. The State argues that the bed and waters of Lake Superior belong to the public, not Docks, and so no taking of private property occurred. Indeed, the Supreme Court has stated that:

> [t]he hallmark of a protected property interest is the right to exclude others. That is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979). That is why the right that we all possess to use the public lands is not the "property" right of anyone – hence the sardonic maxim, explaining what economists call the "tragedy of the commons," *res publica, res nullius.*

Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 673 (1999). If Docks had no private property right to place boat slips on the lakebed at the marina, it cannot have suffered an unconstitutional taking.

¶ 19 The public trust doctrine originated in the Northwest Ordinance of 1787 and the Wisconsin Constitution, Article IX, Section 1.[1] *See Gillen v. City of Neenah*, 219 Wis. 2d 806, 820, 580 N.W.2d 628 (1998). The state holds title to the beds of lakes, ponds, and rivers as follows:

> "The title to the beds of all lakes and ponds, and of rivers navigable in fact as well, *up to the* line of ordinary high-water mark, within the boundaries of the state, became vested in [the state] at the instant of its admission into the Union, in trust to hold the same so as to preserve to the people forever the enjoyment of the waters of such lakes, ponds, and rivers, to the same extent that the public are entitled to enjoy tidal waters at the common law."

State v. Trudeau, 139 Wis. 2d 91, 101, 408 N.W.2d 337 (1987) (quoting *Illinois Steel Co. v. Bilot*, 109 Wis. 418, 425, 84 N.W. 855 (1901)). This includes the beds of the Great Lakes as well as lesser inland waters. *Id.* Public ownership of the bed of a lake applies whether the water is

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[1] Wisconsin Const. art. IX, § 1 states:

> Jurisdiction on rivers and lakes; navigable waters. The state shall have concurrent jurisdiction on all rivers and lakes bordering on this state so far as such rivers or lakes shall form a common boundary to the state and any other state or territory now or hereafter to be formed, and bounded by the same; and the river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well as to the inhabitants of the state as to the citizens of the United States, without any tax, impost or duty therefor.

deep or shallow, and extends to areas covered with aquatic vegetation within the ordinary high water mark of the body of water in question.[2] *Id.* at 103-04. Although the public trust doctrine originally existed to protect commercial navigation, it has been expansively interpreted to safeguard the public's use of navigable waters for purely recreational purposes such as boating, swimming, fishing, hunting, recreation, and to preserve scenic beauty. *See State v. Bleck*, 114 Wis. 2d 454, 457, 338 N.W.2d 492 (1983); *see also Gillen*, 219 Wis. 2d at 820.

¶ 20 The legislature administers the trust for the protection of the public's rights, and it may use the power of regulation to effectuate the intent of the trust. *Id.* at 498. In this regard, as applicable here, the legislature has declared it to be unlawful to place a structure on the bed of a navigable waterway unless a permit has been granted by the DNR, or unless the structure is otherwise authorized by statute.[3] *See* Wis. Stats. §§ 30.12, 30.13; *Cassidy v. DNR*, 132 Wis. 2d 153, 158, 390 N.W.2d 81 (Ct. App. 1986). Further, the legislature has prohibited the

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[2] The high water mark is: "[T]he point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic." *State v. Trudeau*, 139 Wis. 2d 91, 102, 408 N.W.2d 337 (1987) (citing *Lawrence v. American W.P. Co.*, 144 Wis. 556, 562, 128 N.W. 440 (1911)).

[3] A "structure" for these purposes has been defined as "something constructed or built . . . something made up of more or less interdependent elements or parts." *State v. Bleck*, 114 Wis. 2d 454, 463, 338 N.W.2d 492 (1983).

removal of material from the bed of a navigable waterway without a permit. Wis. Stat. § 30.20.

¶ 21 However, subject to the requirements of the public trust doctrine, "Wisconsin has . . . recognized the existence of certain common law rights that are incidents of riparian ownership of property adjacent to a body of water." *Bleck*, 114 Wis. 2d at 466. These include:

> [t]he right to reasonable use of the waters for domestic, agricultural and recreational purposes; the right to use the shoreline and have access to the waters; the right to any lands formed by accretion or reliction; the right to have water flow to the land without artificial obstruction; the limited right to intrude onto the lakebed to construct devices for protection from erosion; and the right, now conditioned by statute, to construct a pier or similar structure in aid of navigation.

Cassidy v. DNR, 132 Wis. 2d at 159 (footnotes omitted).

¶ 22 The rights of riparian owners, however, are qualified, subordinate, and subject to the paramount interest of the state and the paramount rights of the public in navigable waters. *Bleck*, 114 Wis. 2d at 467-68. The common law only requires that riparian owners be allowed reasonable access and use. *Sterlingworth Condo. Ass'n, Inc. v. DNR*, 205 Wis. 2d 710, 731, 556 N.W.2d 791 (Ct. App. 1996).

> [E]very . . . right which a riparian owner acquires, as such, to the waters . . . by his land, is restricted always to that which is a . . . reasonable use, and these terms are to be measured and determined by the extent and capacity of the [lake], the uses to which it has been put, and

> the rights that other riparian owners on the same [lake] also have.

Id. (citing *Apfelbacher v. State*, 167 Wis. 233, 239, 167 N.W. 244, 245 (1918); *State v. Zawistowski*, 95 Wis. 2d 250, 261-62, 290 N.W.2d 303, 309 (1980)).

¶ 23 The public trust doctrine as an encumbrance on riparian rights is established "by judicial authority so long acquiesced in as to become a rule of property." *Franzini v. Layland*, 120 Wis. 72, 81, 97 N.W. 499 (1903). It is part of the organic law of the state, and is to be broadly and beneficially construed. *Diana Shooting Club v. Husting*, 156 Wis. 261, 271-72, 145 N.W. 816 (1914).

¶ 24 The DNR's denial of the dredging permit affected only Docks' ability to construct the final 71 boat slips on the bed and in the waters of Lake Superior, and, as such, implicated only Docks' riparian rights, which are subject to the public trust doctrine. Assuming that riparian rights, subordinate as they are to the rights of the public, are included in the "bundle of rights" recognized as private property for purposes of Fifth Amendment takings analysis, Docks has failed to demonstrate a compensable regulatory taking under *Penn Central* and *Zealy*.[4]

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[4] Docks claimed at oral argument that *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913) supported its position that it had a property right for Fifth Amendment purposes in the 71 additional boat slips. The riparian property owner in *Chandler-Dunbar* claimed a right to construct in the river and upon its land such structures as were necessary to control and use the current of the river for commercial purposes, provided only that such structures not impede or hinder navigation. As the Court noted, under state law, the owner of riparian land carried title all the way to the middle

¶ 25 In *Zealy*, we noted that the United States Supreme Court has not endorsed an analysis that subdivides a contiguous property for purposes of determining whether a compensable taking has occurred. *Zealy*, 201 Wis. 2d at 375-76.

> [R]ather, the Court has consistently held that a landowner's property in such a case should be considered as a whole.
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> > " 'Taking' " jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole. . . .
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> *Penn Central*, 438 U.S. at 130-31, 98 S.Ct. at 2662-63. Similarly, in *Keystone* [*Bituminous Coal*

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thread of the riverbed. However, the Court found this title to be qualified at best, subordinate to the public right of navigation. The Court stated that the riparian owner had the "right of access to deep water, and when not forbidden by public law may construct for this purpose, wharves, docks, and piers in the shallow water of the shore. But every such structure in the water of a navigable river is subordinate to the right of navigation, and subject to the obligation to suffer the consequences of the improvement of navigation, and must be removed if Congress, in the assertion of its power over navigation, shall determine that their continuance is detrimental to the public interest in the navigation of the river" *Id.* at 70. Thus, Docks' reliance on this case is misplaced. *Chandler-Dunbar* actually stands for the proposition riparian rights are subject to the public's superior rights.

> *Ass'n v. DeBenedictis*], 480 U.S. at 498 107 S.Ct. at 1248-49, the Court noted practical arguments against allowing the segmentation of the property at issue:
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> > "Many zoning ordinances place limits on the property owner's right to make profitable use of some segments of his property. A requirement that a building occupy no more than a specified percentage of the lot on which it is located could be characterized as a taking of the vacant area. . . . [O]ne could always argue that a setback ordinance requiring that no structure be built within a certain distance from the property line constitutes a taking because the footage represents a distinct segment of property for takings law purposes."

Zealy, 201 Wis. 2d at 376.

¶ 26 The Supreme Court has reaffirmed its opposition to subdividing property for purposes of takings analysis:

> [W]e rejected this analysis years ago in *Penn Central* . . . where we held that a claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable. To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question.

Concrete Pipe & Prods. v. Constr. Laborers Pension Trust, 508 U.S. 602, 642-44 (1993).

¶ 27 Accordingly, we evaluate the character of the DNR's action, its economic impact and the degree to which it interfered with Docks' investment-backed expectations in light of the marina as a whole rather than the parcel that was to have contained the 71 boat slips.[5] And we do so recognizing that at most, only riparian rights of reasonable access and use, subject to the public trust doctrine, are implicated here.

¶ 28 The DNR acted primarily to protect an emergent weedbed on behalf of the public, and secondarily, to prevent interference with the rights of neighboring riparian owners. Reasonable minds can differ about whether governmental protection of weedbeds is of such a character as to outweigh private property interests. But the state, not Docks, holds title to the lakebed, and therefore, to the extent that a private property interest is implicated here, it is riparian only and therefore qualified in nature, encumbered by the public trust doctrine. We have "jealously guarded the navigable waters of this state and the rights of the public to use and enjoy them." *Delta Fish and Fur Farms v. Pierce*, 203 Wis. 519, 523, 234 N.W. 881 (1931). The character of the governmental action in this case,

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[5] Docks invites us to follow the lead of the United States Court of Appeals for the Federal Circuit in *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994), and adopt "a flexible approach, designed to account for factual nuances" in determining whether to consider the property as a whole or only that portion affected by the regulatory action in question. We declined to do so in *Zealy v. City of Waukesha*, 201 Wis. 2d 365, 378, 548 N.W.2d 528 (1996), and also decline to do so here, where the private property right asserted is so limited.

therefore, weighs against a finding that Docks has suffered a compensable regulatory taking.

¶ 29 Similarly, our evaluation of the severity of the economic impact of the DNR's action, and the extent to which it interfered with Docks' investment-backed expectations, is strongly influenced by the fact that the development of this private marina on the bed and waters of Lake Superior was encumbered by the public trust doctrine and heavily regulated from the get-go. A riparian owner may apply to the DNR for a permit to remove material from or erect a structure on the bed of a navigable waterway in order to facilitate reasonable access and use. But the riparian owner does not have a right to the issuance of a permit if it is detrimental to the public interest. *See* Wis. Stat. §§ 30.12, 30.13 and 30.20.

¶ 30 Docks alleges that the revenue from the sale of the 201 existing boat slips was insufficient to cover the cost of developing the marina and that it has to date lost in excess of $1 million. It claims that the final 71 boat slips would have a combined value of approximately $1.5 million, enough to cover its losses and make a small profit. But the fact that the marina development has thus far yielded a loss does not make out a takings case, and Docks never possessed an unfettered "right" to a particular number of boat slips in the first place. Under the circumstances of this case, the DNR's action cannot be said to have "gone too far" to cause the sort of negative economic impact or substantial interference with investment expectations as to amount to a regulatory taking.

¶ 31 In any event, the DNR's denial of the final dredging permit has not interfered with Docks' present

economic use of its property, considered as a whole. It has a 201-slip marina, and associated recreational facilities, and may have other means of recouping its losses. It is true that Docks' plans for a larger marina have been frustrated, but those plans were encumbered by the public trust doctrine and contingent upon the periodic issuance of DNR permits from the beginning. *See Concrete Pipe*, 508 U.S. at 645 (rejecting takings claim where claimant "had long been subject to federal regulation, and '[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end' ").

¶ 32 Accordingly, we conclude that the DNR's denial of the final dredging permit did not deny Docks all economically beneficial use of its property, or substantially all practical use of its property, and as such, did not constitute a categorical regulatory taking. In addition, because the DNR's action affected only riparian rights, subordinate to the public trust doctrine, and affected only a small portion of the marina development as a whole, it cannot be said to have resulted in the sort of severe economic impact or interference with distinct investment-backed expectations as to constitute a regulatory taking under traditional, ad hoc takings analysis.

By the Court. – The decision of the court of appeals is affirmed.

COURT OF APPEALS
DECISION
DATED AND FILED

July 11, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

No. 99-2904

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT III

R.W. DOCKS & SLIPS,

PLAINTIFF-APPELLANT,

v.

STATE OF WISCONSIN AND WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Bayfield County: THOMAS J. GALLAGHER, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. R.W. Docks & Slips appeals from a summary judgment dismissing Docks' claim against the

Wisconsin Department of Natural Resources. Docks argues that the circuit court erred by concluding that the DNR's denial of a dredging permit did not constitute a regulatory taking. Because Docks maintains the benefit of all or substantially all of its property and because it assumed the risk of loss inherent in commencing a project without all necessary permits, we affirm the circuit court's judgment dismissing Docks' claim.

Background

¶2 The relevant facts are undisputed. Docks, a general partnership in the business of developing recreational marinas, developed Port Superior in Bayfield. Port Superior was designed to consist of 272 boat slips. In 1986, the DNR refused to grant Docks the dredging permit necessary to construct the remaining seventy-one of its 272 planned boat slips. After exhausting the available administrative appeals, Docks filed suit against the DNR in circuit court, alleging a taking of property without just compensation in violation of both the state and federal constitutions. The circuit court subsequently granted the DNR's motion for summary judgment and this appeal followed.

Analysis

¶3 Whether summary judgment was appropriately granted presents a question of law that we review independently of the circuit court. *See* ***Fortier v. Flambeau Plastics Co.***, 164 Wis. 2d 639, 651-52, 476 N.W.2d 593 (Ct. App. 1991). When reviewing summary judgments, we utilize the same analysis as the circuit court and must

apply the standards set forth in WIS. STAT. § 802.08(2). *See* ***Schultz v. Industrial Coils***, 125 Wis. 2d 520, 521, 373 N.W.2d 74 (Ct. App. 1985). In general, "summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." ***Kenefick v. Hitchcock***, 187 Wis. 2d 218, 224, 522 N.W.2d 261 (Ct. App. 1994).

¶4 The circuit court concluded that (1) Docks did not have a recognizable property interest in the seventy-one undeveloped boat slips; (2) even if Docks had a recognizable property interest in the undeveloped boat slips, its interest was subject to the public trust doctrine;[1] and (3) in any event, there was no unconstitutional taking because Docks has retained considerable practical use of the property. Docks contends that the circuit court mischaracterized its argument. It concedes that the DNR had the authority to deny the permits necessary to develop the remaining boat slips. Docks argues, however, that the DNR's denial of the dredging permit necessary to complete the remaining seventy-one boat slips constituted a regulatory taking of Docks' property without just compensation. Specifically, Docks contends that the DNR's denial of the dredging permit either deprived Docks of substantially all of the beneficial use of its property or deprived it of its reasonable investment expectations.

---

[1] Under the public trust doctrine, "the state holds the beds of navigable waters in trust for all of its citizens." ***State v. Bleck***, 114 Wis. 2d 454, 465, 338 N.W.2d 492 (1983). Although originally designed to protect commercial navigation, the doctrine "has been expanded to safeguard the public's use of navigable waters for purely recreational and nonpecuniary purposes." ***Id.***

¶5 The issue of whether the DNR's denial of the dredging permit constituted a regulatory taking of Docks' property without just compensation is a question of law that this court reviews de novo. *See* ***Zealy v. City of Waukesha***, 201 Wis. 2d 365, 372, 548 N.W.2d 528 (1996). Article I, § 13 of the Wisconsin Constitution provides: "The property of no person shall be taken for public use without just compensation therefor." Our supreme court has recognized, however, that a taking "need not arise from an actual physical occupation of land by the government." ***Eberle v. Dane Cty. Bd. of Adjust.***, 227 Wis. 2d 609, 621, 595 N.W.2d 730 (1999). Rather, "[t]here can be a 'taking' if a restriction, short of an actual occupation, deprives the owner of all, or substantially all, of the beneficial use of his property." ***Id.*** (quoting ***Howell Plaza, Inc. v. State Highway Comm'n***, 66 Wis. 2d 720, 726, 226 N.W.2d 185 (1975)). Takings that do not involve physical invasions of land are called "regulatory takings." ***Id.*** at 622.

¶6 When a landowner alleges a regulatory taking, a court should examine the following factors: (1) the character of the governmental action; (2) the economic impact of the regulation on the claimant; and (3) the extent to which the regulation has interfered with distinct investment-backed expectations. *See* ***Zealy***, 201 Wis. 2d at 374. Although a court should consider these factors, "the rule emerging from opinions of our state courts and the United States Supreme Court is that a regulation must deny the landowner all or substantially all practical uses of a property in order to be considered a taking for which compensation is required." ***Id.***

¶7 Before determining whether a regulatory taking has occurred, however, a court must first determine what is the property at issue. *See id.* at 375. Our supreme court has recognized that a landowner's property should be considered as a whole:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.

Id. at 376 (quoting ***Penn Cent. Transp. Co. v. New York City***, 438 U.S. 104, 130-31 (1978)). To the extent that Docks may argue that it has been deprived of all or substantially all of the beneficial use of its property, it is mistaken. We do not look to the value of the undeveloped boat slips, but rather to the value of Docks' property as a whole. Further, any depreciation in the property's value must not be based upon changing the character of the land at the expense of harm to public rights. *See id.* at 380. Despite its inability to develop the seventy-one boat slips, Docks retains the reasonable use of the whole of its riparian property, including the existing 201 boat slips, marina and appurtenant structures.

¶8 Docks nevertheless argues that its investment-backed expectations have been thwarted. It contends:

> [T]he taking has resulted from government approval of the development of marina facilities and infrastructure necessary to incorporate five

> main docks and then, after the facilities and infrastructure have been built, refusing the necessary permit to complete the marina in order to protect a weedbed that would have never grown but for R.W. Docks' investments.

Conversely, the DNR responds that "a property owner who acquires and begins to develop property knowing that permits are required to do so, cannot presume the permits will be granted, and assumes the risk of loss in the event of a denial." We agree. Although Docks intimates that the DNR granted the previous permits with knowledge of Docks' intent to ultimately build 272 boat slips, it nevertheless concedes that it did not have all permits necessary to complete the project and further concedes that the DNR had the authority to deny the necessary permits. As such, Docks should not have presumed that all necessary permits would be granted. It assumed the risk of loss in the event of the DNR's denial of the permits sought.

¶9 Because Docks maintains the benefit of all or substantially all of its property and because it assumed the risk of loss inherent in commencing a project without all necessary permits, we affirm the circuit court's judgment dismissing Docks' claim.[2]

By the Court. – Judgment affirmed.

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[2] We refrain from addressing any alternative arguments because only dispositive issues need be addressed. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983).

Not recommended for publication in the official reports.

STATE OF WISCONSIN BAYFIELD COUNTY
CIRCUIT COURT

R. W. DOCKS & SLIPS,

Plaintiff,

v. Case No. 99-CV-1

STATE OF WISCONSIN and
WISCONSIN DEPARTMENT OF
NATURAL RESOURCES,

Defendants.

ORDER AND JUDGMENT

(FILED OCT. 19, 1999)

The plaintiff R. W. Docks & Slips filed this action claiming that the denial of a permit to develop 71 additional slips in its 201-slip marina was a taking of private property without compensation, in violation of the state and federal constitutions. The defendants State of Wisconsin and Wisconsin Department of Natural Resources moved for summary judgment dismissing the complaint. The parties filed briefs and supporting documents, and a hearing on the motion was held before the court on August 31, 1999. The plaintiff appeared by its attorneys Bruce A. Rasmussen and Don P. Novitzke, and the defendants appeared by Assistant Attorney General JoAnne F. Kloppenburg. At the hearing the court issued an oral decision, having reviewed the pleadings, briefs and papers filed with the court and having heard the arguments at the hearing.

For the reasons stated in the oral decision on August 31, 1999, a transcript of which is attached and incorporated by reference, the court finds that 1) there is no recognizable property interest in the additional 71 slips because under the longstanding common law principle of the public trust doctrine the right to build these additional slips was not part of the plaintiff's title, 2) even if there is a recognizable property interest that could be taken, there was no unconstitutional taking because the plaintiff's riparian rights to construct structures on the surface and above the bed of Lake Superior were always subject to the public trust doctrine, which has long been in place in Wisconsin, and 3) even if there is a recognizable property interest, there was no unconstitutional taking because the plaintiff has retained considerable practical use of the property in that it has built and sold 201 slips, the property is not valueless but is worth at least $2 million, and there is no evidence showing adverse economic impact resulting from the state action.

NOW, THEREFORE, IT IS ORDERED that:

1. The defendants' motion for summary judgment is GRANTED.

2. The complaint is DISMISSED.

3. JUDGEMENT is ENTERED with costs in the amount of $100 in favor of the defendants.

Dated this 19 day of October, 1999.

BY THE COURT:

/s/ Thomas J. Gallagher
THOMAS J. GALLAGHER
Circuit Court Judge

STATE OF WISCONSIN BAYFIELD COUNTY
CIRCUIT COURT

R. W. DOCKS & SLIPS,

Plaintiff,

vs.

STATE OF WISCONSIN and
WISCONSIN D.N.R.,

Defendants. Case No. 99-CV-01

HONORABLE THOMAS J. GALLAGHER, PRESIDING

PARTIAL TRANSCRIPT

DECISION

Hearing held on August 31, 1999 at the Bayfield County Courthouse, Washburn, WI

Appearances: For the Plaintiff:
Mr. Don Paul Novitzke,
Attorney of Record
Mr. Bruce Rasmussen,
Attorney at Law

For the Defendant:
Ms JoAnne Kloppenburg,
Assistant Attorney Gen.

[2] THE COURT: Alright, here's what I'm going to do. I'm going to grant the defendant's motion for summary judgement dismissing the plaintiff's complaint on the merits, together with the taxable costs and disbursements of the action. And here's why:

First of all, I find that the plaintiffs have no recognizable property interest at stake in this case. What the plaintiffs are claiming in the complaint, and I have to liberally construe the complaint in the plaintiffs' favor to even go by the test as to whether it states a cause of action, is that the plaintiff somehow has a property, recognizable property interest, in developing 71 more boat slips than are already there. Plaintiff has developed a marina, there's breakwater, already 201 slips. There's already considerable improvements connected with the marina on the riparian land adjacent to Lake Superior to which the plaintiffs claim, I guess, that it owns, although that's not entirely clear to me, liberally construing the complaint I will give them that. The 71 boat slips do not exist today, they have not been built, and they will not apparently be built, because they cannot obtain the approval they need to build them from the Department of Natural Resources. Those decisions were made by the Department, and by Administrative Law Decision, and

by Circuit Court Decision affirming the Administrative Law Decision. At least one of the Administrative Law Decisions apparently was not even taken for review in the Circuit Court, that's concerning the estoppel issue. So it's settled, as far as this case goes, they're not going to be [3] able to develop the remaining 71 boat slips which were to be built on the surface of Lake Superior.

Plaintiff on the one hand contends that the 71 boat slips are somehow a recognizable property interest of riparian land owner, even though they don't exist, and on the other hand claim that condominium declaration filed in the Register of Deeds Office in this county creates this recognizable property interest in the 71 boat slips, which apparently are, I'm satisfied are included in the condominium declaration. That's on record. No approval by anyone were necessary to record these condominium declarations. All they had to do was hire a surveyor, have some lawyer draft the condominium declaration as to conform to the statute and title them to be recorded in the Register of Deeds Office. I do not find that creates recognizable property interest under either the Fifth Amendment, or the Wisconsin Constitution. These 71 slips that exist only in condominium declaration cannot be conveyed today they do not exist. Any right of riparian land owner, including the right to develop these condominium slips that are in the declaration are qualified by the Public Trust Doctrine in this State where the State owns the bed of Lake Superior. That's a long standing common law tradition, so that such use of riparian rights by the plaintiff were always not part of its title to begin with. Even if somehow one can find that there is a recognizable property interest that could be taken, there's been no taking.

As I indicated earlier, such a right was always subject to the property . . . subject to the Public Trust and well understood for [4] centuries in this State that the State powers over the Public Trust Doctrine, or under the Public Trust Doctrine over construction on the surface of Lake Superior and above the bed of Lake Superior. That anyone who acquired riparian rights takes that title subject to the Public Trust Doctrine.

Further, the plaintiff has had reasonable use of the property. They have constructed a considerable marina development. They have constructed 21, and sold . . . not 21, 201, and sold 201 boat slips under condominium ownership. This property is not valueless. The plaintiffs themselves give the riparian real estate a value at the present time of $2 million Dollars. They have retained a considerable practical use of the property. They apparently no longer have an active interest in the operation of the marina, but they could have, and I'm not satisfied, in any event, that the evidence submitted by the plaintiff in opposition to the motion show any adverse economic impact. And even if it did that was probably due to business decision, or other development problems that were made, or created by the plaintiff.

For those reasons I'm not even going to bother to go to the just compensation issue. And Ms Kloppenburg, do you want to draft something?

MS KLOPPENBURG: Certainly.

THE COURT: Thank you.

. . .

I, DELORES KITTLESON, do hereby certify that the above transcript is a complete and accurate copy of the proceedings taken by me on the Stenograph Machine, and transcribed into typewritten form by myself.

Dated: 9-29-99

/s/ Delores Kittleson
DELORES KITTLESON
CIRCUIT COURT REPORTER
BAYFIELD COUNTY
COURTHOUSE
P. O. BOX 12
WASHBURN, WI 54891

CIRCUIT COURT

STATE OF WISCONSIN BAYFIELD COUNTY

R. W. DOCKS & SLIPS,

Plaintiff,

v. Case No. 990-CV-1

STATE OF WISCONSIN and
WISCONSIN DEPARTMENT OF
NATURAL RESOURCES,

Defendants.

AFFIDAVIT OF ROBERT F. HOLMGREN

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Robert F. Holmgren, being duly sworn and on his oath, deposes and says of his own personal knowledge:

1. I am the managing agent of plaintiff and have been since the inception of the Pike's Bay Marina project in Bayfield County, Wisconsin in 1968.

2. Attached hereto is an illustration which accurately depicts Port Superior Marina at the time of the proceedings herein.

3. Plaintiff acquired the parcel of real estate riparian to Pike's Bay in 1968 for the purpose of developing a sheltered harbor with depths sufficient to accommodate sailboats.

4. In 1968, plaintiff applied to the U. S. Army Corps of Engineers for a permit to construct a breakwater and boat harbor. I fully apprised officials of the Corps of plaintiff's plans to install sailboat docks in the entire sheltered harbor. The Corps gave plaintiff permission to proceed and in 1972 formally issued a permit "to construct a breakwater and boat harbor in Pike's Bay on Lake Superior in Bayfield, Wisconsin."

5. Upon receiving permission from the Corps to proceed, plaintiff applied to the Department of Natural Resources for a contract to remove materials from the bed of Lake Superior. A contract was made between the Department of Natural Resources and Plaintiff on December 30, 1968.

6. In 1968, plaintiff also applied to the Department of Natural Resources for a permit to construct a breakwater and boat harbor. I fully apprised officials of the Department of Natural Resources of plaintiff's plans to install sailboat docks in the entire sheltered harbor. In 1969, the Department issued plaintiff a permit to construct a breakwater on the bed of Lake Superior "to provide a protected harbor for a marina."

7. In 1971, plaintiff commenced construction of a lagoon in what it considered upland on the assumption that the shoreline of the lake was the natural shoreline. A dispute ensued with the Department of Natural Resources over whether the lagoon was actually on the lakebed. I explained to officials of the Department of Natural Resources that it was necessary for plaintiff to own the real estate which subtended docks 4 and 5 as construction of those docks was necessary to complete

the marina. The Department of Natural Resources and plaintiff ultimately reached a negotiated settlement which was designed to permit plaintiff to construct docks 4 and 5. The Department of Natural Resources and plaintiff agreed to a legislated shoreline in the upland which gave plaintiff riparian rights to the area occupied by docks 4 and 5 and the Department of Natural Resources agreed to grant plaintiff, as riparian owner, a permit to construct a structure on the bed of the lake. The purpose of the structure, called the quay, was to serve as the base of docks 4 and 5 of the marina.

8. In 1977, plaintiff converted the marina to a 272 boat/slip marina condominium under Wisconsin law. Two hundred one of these condominium units were developed and sold.

9. Plaintiff invested heavily in the improvements required by a first class marina of 272 boat slips. Among the improvements made by plaintiff are land acquisition, breakwater, seawall, dredging, pool and racquet club, swimming pool, tennis court, surfacing and landscaping, wells and water system, sewage treatment plant, lift station and force main, sewer laterals and connections.

10. Plaintiff planned to recover its investment by developing and selling the entire 272 condominium units. The revenues from the first units sold would be used to pay for the improvements and plaintiffs profit, if any, would be derived from the sale of the final units. Plaintiff developed and sold 201 units. The revenues from these units was not sufficient to pay for the improvements and plaintiff has lost in excess of one million dollars on the marina development.

11. The remaining 71 units have a retail value of approximately $1.5 million.

12. The regulatory scheme imposed by the Corps and the Department in 1968 for dredging and dock construction worked as follows. Plaintiff would apply to the Corps for a permit to dredge and construct docks. Upon receipt of the permit from the Corps, plaintiff would apply to the Department of Natural Resources for a contract to remove materials from the bed of the lake. The Department of Natural Resources would routinely enter contracts with plaintiff requiring a nominal cash payment, posting of a bond, and proper disposal of dredging soils. The Department of Natural Resources required no permits of its own. This regulatory scheme as to dredging contracts remained in effect until 1986 when the Department refused to contract with plaintiff for the removal of 15,000 cubic yards of material from the bed of the lake and until 1996 when the Department first imposed a requirement for a structure permit to construct floating docks. Prior to 1996, plaintiff continued to install finger docks on the previously constructed main docks.

13. Plaintiff in good faith applied to the Department for all approvals required by the Department to complete its marina but its applications were denied.

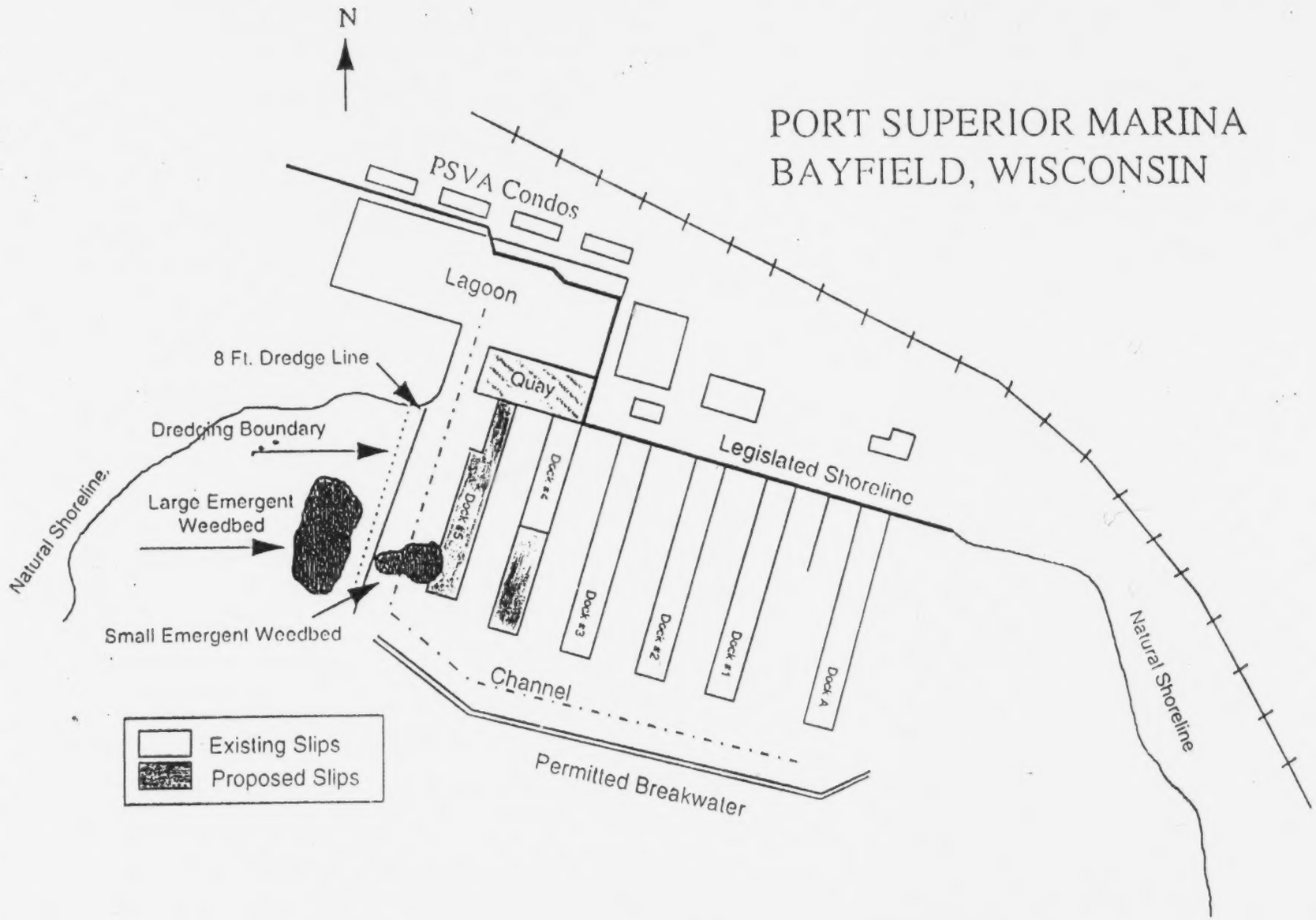
Further affiant sayeth naught save that he gives this affidavit in opposition to defendants' motion for summary judgment.

/s/ Robert F. Holmgren
Robert F. Holmgren

Subscribed and sworn to before me
this 20th day of May, 1999.

/s/ Lee A. Sanford
Notary Public

(SEAL) LEE A. SANFORD
NOTARY PUBLIC • MINNESOTA
My Comm. Expires Jan. 31, 2000



PIKES BAY – LAKE SUPERIOR

ILLUSTRATION

BEST AVAILABLE COPY

Exhibit 70
Exhibit K

Port Superior Marina Association

in Port Superior Village
***Bayfield Wisconsin* 316951**

DECLARATION OF TRUST

IN ACCORDANCE WITH THE UNIT OWNERSHIP

ACT OF WISCONSIN

PORT SUPERIOR MARINA ASSOCIATION

Article 1. Purpose: This Declaration of Trust is executed by the undersigned developers, Robert F. Holmgren and Gertrude I. Holmgren d/b/a R. W. Docks & Slips, a Minnesota partnership, licensed to do business in Wisconsin, fee simple owner of the real estate described hereinafter, for the purpose of forming an association for itself and all future owners pursuant to the UNIT OWNERSHIP ACT, Sections 703.01 to 703.28 of the Wisconsin Statutes.

Article 2. *Name:* The name of the association shall be Port Superior Marina Association.

Article 3. *Duration:* The period of existence of the association shall be perpetual.

Article 4. *Definition:* Unless the context of this Declaration requires otherwise, the definitions of the words used herein, in the By-laws, and in any other documents executed pursuant to this Declaration of trust shall be those set forth in Wisconsin Statutes Section 703.02.

Article 5. *Description of Land:* The property submitted and subjected to the provisions of the Unit Ownership

Act is a Leasehold Interest as described in Volume 307 page 383 & 384 in the Register of Deeds for Bayfield County describing real, personal property and/or easements, said Leasehold Interest is described as follows:

REGISTER'S OFFICE)
) S.S.
Bayfield County, Wis.)

RECORDED AT 4:30 P.M.
ON OCT 3-77 IN
Vol. 307 of Rec
Page 337-429, Incl.

/s/ Otto Korpela
REGISTER OF DEEDS

Fee Due 71.30

Marina Area

That part of Government Lot 3, Section 22, T. 50 N., R. 4W, Bayfield County, Wisconsin, described as follows: Beginning at an iron pipe at the intersection of the North-South 1/4 line of said Section 22 with the water's edge of Lake Superior. Thence N. 00° 21' E., along said 1/4 line 233.24 feet, to a 5/8 inch rebar. Thence S. 76° 04' 43"W., 609.89 feet to a 1" iron pipe. Thence S. 29° 43' 20" E., 221.30 feet to a 1/2" rebar. Thence N. 60° 16' 40" E., 188.66 feet to a 1/2" rebar. Thence S. 29° 43' 20" E., 121.25 feet to a 1/2" rebar. Thence S. 60° 16' 40" W., 325.85 feet (passing thru a 1/2" rebar at 188.66 feet.) Thence S. 29° 43' 20" E., 19.62 feet to a 1" iron pipe on the Bulkhead line of Lake Superior. Thence N. 60° 49' 11" E., 607.18 feet along said Bulkhead line to the point of beginning. Together with an easement for purposes of egress, ingress and regress over

and across a strip of land 30 feet in width on either side of the following described line; Commencing at the Southwest corner of said Section 22; thence east along the South section line a distance of 1,320 feet; thence North 692 feet; thence North 57° East a distance of 90 feet to the point of beginning; thence South 30° East a distance of 420 feet; thence North 72° East a distance of 368 feet more or less. To be included along with this description are all docks, fuel and waterlines, breakwalls and seawalls of Port Superior Marine Association and area between breakwalls and seawalls, in Lake Superior and bulkhead lines as established. Grantors reserve easement on above described premises to use parking facilities and grant same to others. Parcel contains 3.08 acres.

Also:

A second easement for purposes of egress, ingress and regress over and across the following described property: That part of Government Lot 3, Section 22, T. 50 N., R 4W., Bayfield County, Wisconsin, described as follows: To locate point of beginning, commence at the iron pipe marking the intersection of the North-South 1/4 line of said Section 22 with the water's edge of Lake Superior. Thence run S. 87° 48' 20" W., 317.23 feet to a 1/2 inch rebar. Thence S. 60° 16' 40" W., 188.66 feet to a 1/2 inch rebar. Thence N. 29° 43' 20" W., 221.30 feet to a 1 inch iron pipe which is the point of beginning. Thence S. 75° 37' 10" W., 142.25 feet to a 1/2 inch iron pipe. Thence S. 29° 43' 20" E. 40 feet. Thence N. 75° 37' 10" E. 142.25 feet. Thence N. 29° 43' 20" W. 40 feet to the point of beginning.

All as described in the Plat of Survey attached hereto as Exhibit "A" and incorporated herein by reference as a portion of this Declaration of Trust.

Article 6. *Description of Buildings:* All buildings and attachments located on premises.

Article 7. *The Units:* The unit numbers of the units contained in the said Exhibit "A" are as follows: Boat Slips numbered consecutively from 1 through and including 272 and Docks "A"; "1"; "2"; "3"; "4"; and "5."

Each future lessee shall be entitled to the exclusive possession of his unit in accordance with the terms of this Declaration. Each unit, together with its undivided interest in the common areas and facilities, shall for all purposes constitute real property.

The location, approximate area, and immediate common area to which each unit has access is set forth in Exhibits "A" and "B". The legal description of each unit shall consist of its number as aforesaid. Every deed, lease, mortgage, or other document may describe a unit by its identifying number shown on Exhibit "A", and such description shall be good and sufficient for all purposes. No unit owner may sub-divide his unit smaller than that shown on Exhibit "A". Each unit shall consist of the space enclosed and bounded by the interior surfaces of the unit as shown on Exhibit "A", and further designated on Exhibit "B", subject to any encroachment created by settlement or moving of the docks, or permissible repairs or modifications which are deemed valid easements for the benfit [sic] of such unit owners, or the common element; as the case may be, excepting such as may be created by willful conduct.

Article 8. *Description of Common Areas and Facilities:* The common areas and facilities shall consist of all of the property designated on the said Plat of Survey (Exhibit "A") as common areas. Any structures erected or maintained within said common boundary as aforesaid shall be a part of the common areas and facilities.

All easements and rights described herein are appurtenant, running with the land, perpetual, bonding on the undersigned, its successors and assigns, and where designated as common areas and facilities, shall constitute such common areas and facilities pursuant to this Declaration of Trust.

Article 9. *Description of Limited Common Areas and Facilities:* There are no limited common areas as defined in the unit Ownership Act designated as such in this Declaration of Trust, except that when all units are leased the By-laws may designate specific parking areas as limited common area reserved for the use of parking.

Article 10. *Value of Property:* The value of the property as defined in the Unit Ownership Act is $1,496,000.00. The value of each unit and the percentage of undivided interest in the common areas and facilities appertaining to each unit and its owner for all purposes, including voting, shall be an average value of $5500 for each of the units and each unit shall have an equal share of one vote per unit owned.

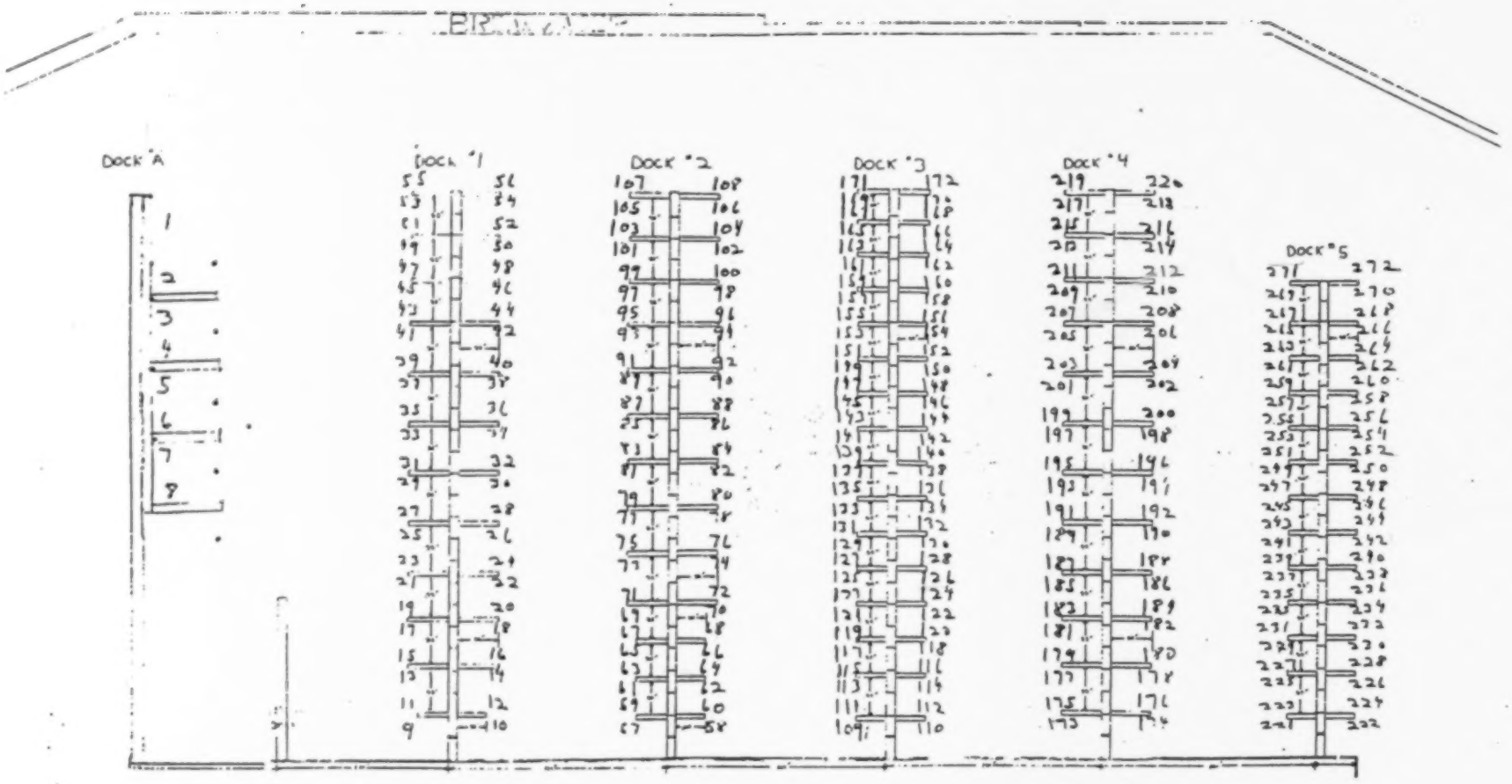
Each unit owner shall own an undivided interest, in the percentages hereinbefore set forth, in the common areas and facilities as a tenant in common with all other unit owners, and, except as may otherwise be limited in this Declaration, shall have the right to use and occupy

the common areas and facilities for all purposes incident to the use and occupancy of his unit, including the right to vote as hereinafter set forth, and such incidental uses permitted by this Declaration, which right shall be appurtenant to and run with his unit. The above percentages shall be permanent and may not change without consent of all unit owners by amendment to this Declaration.

The building and premises, including all individual units, are to be used solely for recreational purposes in strict conformity with the restrictions and covenants hereto attached.

Article 11. *Rights and Obligations of the Association:* Robert F. Holmgren and Gertrude I. Holmgren d/b/a R. W. Docks & Slips ("The Developer") shall retain fee simple title to the Boat Slip/Units, Common Areas and Facilities (hereinafter referred to as "demised premises") (See Attachment "A") for and during the term hereinafter mentioned. Said "demised premises" is more particularly described in this Declaration and Exhibits, recorded under the Unit Ownership Act, in the office of the Register of Deeds, Bayfield County, Wisconsin, which are made a part hereof by reference.

EXHIBIT A-1



Supreme Court, U.S.
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No. 01-520

In The

Supreme Court of the United States

R.W. DOCKS & SLIPS,

Petitioner,

v.

STATE OF WISCONSIN and WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

RESPONDENTS' BRIEF AND APPENDIX IN OPPOSITION

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QUESTION PRESENTED

The State of Wisconsin Department of Natural Resources denied R.W. Docks' applications to expand its 201-slip marina by dredging and adding 71 slips, in order to protect an environmentally sensitive natural resource and to prevent interference with the rights of neighboring riparian owners. R.W. Docks enjoyed the full economic use of its marina, and the present value of R.W. Docks' riparian property and improvements was $10 million. R.W. Docks did not own the lakebed below the marina and had only the riparian right of reasonable access to the water in which the marina was placed, subordinate to public rights in that water under the public trust doctrine. The question presented is whether the State of Wisconsin took R.W. Docks' property in violation of the state and federal constitutions when it denied R.W. Docks' applications for permits to dredge and build on the State's property.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

STATEMENT 1

ARGUMENT 7

CONCLUSION 16

CASES CITED

Andrus v. Allard,
444 U.S. 51 (1979) 14

Att'y Gen. ex rel. Becker v. Bay Boom
Wild Rice & Fur Co.,
172 Wis. 363, 178 N.W. 569 (1920) 10

Boorman v. Sunnuchs,
42 Wis. 233 (1877) 7

College Sav. Bank v. Florida Prepaid Postsecondary,
__ U.S. __, 119 S. Ct. 2219 (1999) 9

Delaplaine and another vs The C. & N.W. R'y Co.,
42 Wis. 214 (1877) 8

Diana Shooting Club v. Husting,
156 Wis. 261, 145 N.W. 816 (1914) 11, 12

Diedrich v. The N.W.U. R'y Co.,
42 Wis. 248 (1877) 8, 9

Dolan v. City of Tigard,
512 U.S. 374 (1994) 14

Franzini v. Layland,
120 Wis. 72, 97 N.W. 499 (1903) 12

Gillen v. City of Neenah,
219 Wis. 2d 806, 580 N.W.2d 628 (1998) 10, 12

Hawkins Point Lighthouse Case,
39 F. 77 (1889) 8

Hixon v. Public Service Comm.,
32 Wis. 2d 608, 146 N.W.2d 577 (1966) 10, 12

Illinois Central Railroad v. Illinois,
146 U.S. 387 (1892) 8, 9, 12, 13

Just v. Marinette County,
56 Wis. 2d 7, 201 N.W.2d 761 (1972) 10

Kaiser Aetna v. United States,
444 U.S. 164 (1979) 11

Loveladies Harbor, Inc. v. U.S,
28 F.3d 1171 (Fed. Cir. 1994) 14

Lucas v. South Carolina Coastal Council,
505 U.S. 1003 (1992) 6, 7, 11, 13, 14

Mariner v. Schulte,
13 Wis. 775 (1861) 9

Marks v. U.S.,
34 Fed. Cl. 387 (1995),
affirmed 116 F.3d 1490 (Fed. Cir. 1997) 11

Mayer v. Grueber,
29 Wis. 2d 168, 138 N.W.2d 197 (1965) 10

Muench v. Public Service Comm.,
261 Wis. 492, 53 N.W.2d 514,
55 N.W.2d 40 (1952) 10, 11, 12

Palazzolo v. Rhode Island,
__U.S.__, 121 S. Ct. 2448 (2001) 6, 7, 13

Palm Beach Isles Association v. U.S.,
208 F.3d 1374 (Fed. Cir. 2000) 11

Penn Central Transportation Co. v. City of New York,
438 U.S. 104 (1978) 6, 14

Concrete Pipe & Prods. v. Constr. Laborers Pen.,
508 U.S. 602 (1993) 7, 14

R.W. Docks & Slips v. DNR,
145 Wis. 2d 854,
429 N.W.2d 86 (Ct. App. 1988) 3

Reuter v. DNR,
43 Wis. 2d 272,
168 N.W.2d 860 (1979) 10

Scranton v. Wheeler,
179 U.S. 141 (1954) 8

State ex rel. Chain O'Lakes Protective Ass'n v. Moses,
53 Wis. 2d 579, 193 N.W.2d 708 (1972) 10

State v. Bleck,
114 Wis. 2d 454, 338 N.W.2d 492 (1983) 10

State v. Deetz,
66 Wis. 2d 1, 224 N.W.2d 407 (1974) 12

State v. Trudeau,
139 Wis. 2d 91, 408 N.W.2d 337 (1987) 8, 12

Wis. Environmental Decade, Inc. v. DNR,
85 Wis. 2d 518, 271 N.W.2d 69 (1978) 10

Zealy v. City of Waukesha,
201 Wis. 2d 365, 548 N.W.2d 528 (1996) 10

WISCONSIN STATUTES CITED

Wis. Stat. ch. 30.....13

Wis. Stat. § 30.03 13

Wis. Stat. § 30.12 2

Wis. Stat. § 30.20 2

Wis. Stat. § 30.294 13

CONSTITUTIONAL PROVISIONS

Wis. Const. article IX, § 1 9

No. 01-520

In The

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R.W. DOCKS & SLIPS,

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v.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

RESPONDENTS' BRIEF AND APPENDIX IN OPPOSITION

STATEMENT

1. R.W. Docks & Slips is one riparian owner of 1,100 feet of frontage, and a developer of a private 201-slip marina adjacent to that frontage, in an environmentally sensitive and valuable portion of Lake Superior. Complaint and Answer, ¶¶1,5; R-Ap. 38a-39a, ¶¶2, 5-10; R-Ap. 4a-9a.

R.W. Docks began developing the marina in 1969, when it received its first permit to construct the breakwater for its planned marina. R-Ap. 45a. This first permit for a dredging contract expressly stated that "the granting of this dredging contract is not to be construed as an assurance that the application for a structure at this location will be granted." R-Ap. 65a-66a. In 1971, the Department of Natural Resources discovered that R.W. Docks was removing and depositing materials from and on the bed of Lake Superior in violation of Wis. Stat. §§ 30.20 and 30.12.[1] R-Ap. 52a-53a. Those violations were resolved with payment of forfeitures and notice that existing and future construction was subject to both permitting provisions: "The Department shall not, however, be precluded from reopening this proceeding upon complaint . . . if the necessary permits are not obtained to legalize the already completed construction, as well as any future construction." R-Ap. 53a.

A permit to construct the breakwater was issued on March 10, 1971, at the same time that another breakwater structure was rejected as not meeting statutory standards. R-Ap. 23a. The 1971 permit specified it applied only to the specific structures in the breakwater plan and 2 boat ramps, and expired in two years. R-Ap. 23a. A 1972 permit to place a solid pile quay structure on the bed of the lake, "to create a harbor for the mooring of boats," was similarly limited, and provided that the permit could be amended or rescinded if the

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[1] Wisconsin Stat. § 30.12 provides that no material may be deposited or structure placed on the bed of a navigable water without a permit, and that permits may be issued for a deposit or structure only "if the structure does not materially obstruct navigation or reduce the effective flood flow capacity of a stream and is not detrimental to the public interest." Wisconsin Stat. § 30.20 provides that "no person may remove any material from the bed of any navigable lake or from the bed of any outlying waters of this state without first obtaining a contract" that is consistent with public rights and protects the public interest.

structure became a material obstruction to navigation or detrimental to the public interest. R-Ap. 67a-68a.

R.W. Docks experienced economic problems in 1972-75, lost the marina in 1976, and repurchased the marina in 1977. R-Ap. 24a.

On January 10, 1983, R.W. Docks applied to the Department of Natural Resources for a contract to dredge 20,000 cubic yards of material from the bed of Lake Superior. R-Ap. 28a. The department expressed concern over the environmental impacts of the proposal, and after discussions between the department and R.W. Docks, R.W. Docks separated its application into two applications, one to remove 5,000 cubic yards and one to remove 15,000 cubic yards. *Id.* In June 1983, the department approved the application to remove 5,000 cubic yards. *Id.* After additional investigation and evaluation by department staff, the department denied the application to dredge the remaining 15,000 cubic yards in a decision dated April 17, 1986. *Id.*

This 1986 denial was not a departure from previous practice, as asserted by R.W. Docks in its petition (at 7), but was consistent with the previous permit rejections, limitations and grants, each grounded on the application of statutory standards to the circumstances at the time.

R.W. Docks filed a petition for review of the 1986 denial. The Dane County Circuit Court issued a decision and order remanding the matter to the department for an administrative hearing on the merits of the application and to address issues raised in the court's opinion. R-Ap. 28a. That decision was affirmed on appeal. *R.W. Docks & Slips v. DNR*, 145 Wis. 2d 854, 429 N.W.2d 86 (Ct. App. 1988).

In 1994, R.W. Docks submitted an application for a permit to extend Dock 4 to enable construction of six additional slips. R-Ap. 55a-64a. After evaluation and public

comment, the department on June 29, 1995, issued a permit for a 44-foot extension of Dock 4 allowing only two additional slips. R-Ap. 55a-64a.

Meanwhile, on March 27, 1995, R.W. Docks submitted an application for a permit to construct Dock 5, 90 feet long with six slips. R-Ap. 1a. A hearing on both the application for a contract to dredge 15,000 cubic yards and the application for a permit to construct 6 new slips on Dock 5, was held later in 1995. R-Ap. 1a-2a. At the hearing, the application was changed to seek permits to construct an enlarged Dock 5, 408 feet long with approximately 50 slips, and to extend Dock 4 by over 200 feet with 21 additional slips.

On August 15, 1996, the Administrative Law Judge (ALJ) issued an order denying the dredging contract and marina expansion permit because the proposed dredging and slip expansion would be detrimental to public interests and would not be consistent with public rights in navigable waters. R-Ap. 14a-15a. He found that:

> Given the environmental significance of the currently existing weed bed, public rights in public waters would be detrimentally impacted by the loss of rare fish and wildlife habitat, and destruction of macroinvertabrate, mussels and zooplankton communities. Dredging of this environmentally rich area would not be consistent with public rights in maintaining and preserving the state's natural resources.

R-Ap. 6a. He found that the proposed dredging and slip expansion would destroy a rare plant, fish and wildlife habitat, reduce fishery values and fish stock, result in the destruction of a rare environmental resource with high aesthetic values, damage wetland functional values, and have significant adverse cumulative impacts on the natural and public resources of Lake

Superior. R-Ap. 39a, 6a-9a, ¶¶6-10. He also found that the proposed dock expansion would interfere with access rights of neighboring riparians. R-Ap. 39a, 11a-12a.

While the weedbed cited by the ALJ may not have "emerged" (grown up above the surface of the water) had R.W. Docks not built the breakwater, as asserted by R.W. Docks in its petition (at 3 and 7), the weedbed in its "submergent state" (below the surface of the water) and the aquatic vegetation important for fish and other aquatic life predated the marina developments. R-Ap. 5a-8a. Moreover, the permit and contract were denied also because of the adverse impact on the functional values of the wetland complex of which the weedbed (whether emergent or submergent) was a part. R-Ap. 8a-9a.

R.W. Docks sought judicial review of the order, and the Dane County Circuit Court issued a decision on May 29, 1997, affirming the order and remanding only for making findings on the issue of estoppel. The ALJ determined in an order dated September 12, 1997, that the elements of estoppel had not been proven. R-Ap. 17a-26a. The 1997 Order was not appealed to a circuit court, and the 1997 Decision was not appealed to the court of appeals.

The present value of R.W. Docks' riparian property is $2 million, and the present value of its improvements on that property is $8 million. R-Ap. 70a, ¶4.

None of the activities for which R.W. Docks sought the department's approval would occur on its own property. The activities it proposed were to dredge and construct in public waters over public lakebed.

2. It was based on these undisputed facts that R.W. Docks' taking claim was adjudicated. The trial court denied that claim for 3 reasons: 1) R.W. Docks had no protectible property interest in the additional 71 slips because under the

longstanding common law principle of the public trust doctrine the right to build these additional slips was not part of its title; 2) even if R.W. Docks had a protectible property interest in the additional 71 slips, there was no unconstitutional taking because its riparian rights to construct structures on the surface and above the bed of Lake Superior were always subject to the public trust doctrine; and 3) nor was there an unconstitutional taking because R.W. Docks retained considerable practical use of its property in that it built and sold 201 slips adjacent to that property, the property was worth at least $2 million, and no evidence was presented showing adverse economic impact resulting from the denial. P-Ap. 25-31.

The court of appeals denied the taking claim because R.W. Docks maintained reasonable use of the whole of its riparian property plus the marina, and because it assumed the risk of loss inherent in commencing a project without all necessary permits. P-Ap. 18-24. The Wisconsin Supreme Court affirmed the denial based on a combination of the reasons of both lower courts. P-Ap. 1-17.

The Wisconsin Supreme Court did not, as asserted by R.W. Docks in its petition (at 9), recognize only 2 types of regulatory taking. Rather, the court adopted this Court's recognition of at least 2 categories of regulatory action deemed to be a taking without engaging in any case-specific factual inquiry. P-Ap. 7. Consistent with this Court's decisions in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), and *Palazzolo v. Rhode Island*, __U.S.__, 121 S. Ct. 2448 (2001), the Wisconsin Supreme Court found that the permit and contract denials did not constitute either one of those 2 types of taking, because they did not effect a physical invasion of R.W. Docks' private property, nor did they deny R.W. Docks all or substantially all economically beneficial or productive or practical use of its property. P-Ap. 7.

The Wisconsin Supreme Court then applied the *Penn Central* 3-factor test, recognizing that R.W. Docks did not own the lakebed beneath its marina and had at most a riparian right of reasonable access to and use of the water in which the marina was placed. P-Ap. 8-12. Consistent with this Court's decisions in *Penn Central*, *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602 (1993), and *Palazzolo*, the Wisconsin Supreme Court declined to subdivide R.W. Docks' contiguous property and applied the test to the whole of its riparian property and the adjacent marina. P-Ap. 13-15. The court concluded that the effect of the denials on R.W. Docks' riparian rights, which are subordinate to the public trust doctrine, relative to its marina as a whole, did not result "in the sort of severe economic impact or interference with distinct investment-backed expectations as to constitute a regulatory taking." P-Ap. 17.

ARGUMENT

The petition for a writ of certiorari should be denied because the Wisconsin Supreme Court's decision does not conflict with any decision by this Court, does not otherwise present an issue warranting review, and is correct.

1. R.W. Docks faults the Wisconsin Supreme Court's insertion of the public trust doctrine into its taking analysis. The court's resort to the public trust doctrine is mandated by longstanding Wisconsin law and is entirely consistent with decisions by this Court.

The controlling rule of law is that there is no taking where a governmental action effectuates a limitation that inheres in the property owner's title as a background principle of state property or nuisance law. *Lucas*, 505 U.S. at 1027-29; *Palazzolo*, 121 S. Ct. at 2464. Decisions by the Wisconsin Supreme Court and this Court establish, beyond dispute, that the public trust doctrine is one such principle,

which bars the taking claims asserted here. It is precisely because the public trust in lakebed and navigable waters is so clearly established and longstanding, that this case does not require the Court to weigh the legitimacy and scope of a "background principles" defense.

In 1877 the Wisconsin Supreme Court stated in *Diedrich v. The N.W.U. R'y Co.*, 42 Wis. 248, 266 (1877):

> It is difficult to perceive how the riparian owner [with title to the bank only] could take right to intrude upon the public fee under the water, which he might not take to intrude upon the private fee bounding his estate upon the land side.

What R. W. Docks proposes is precisely that, to build on the property of another, the State of Wisconsin. Under the public trust doctrine, the lakebed and waters of Lake Superior do not belong to R.W. Docks, but are the property of the State of Wisconsin. The state has not restricted R.W. Docks from doing something on its own property, but has only decided that R.W. Docks cannot alter public property. R.W. Docks' claim that the state must pay for declining to give it public property, is contrary to the law established by this Court and in Wisconsin.

It is settled federal and state law that the bed of Lake Superior is not private property under the Fifth Amendment or art. I, § 13 of the Wisconsin Constitution, but is public property owned by the state. *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 452 (1892) (state holds title to lands under Lake Michigan and controls the use of the water above it); *Scranton v. Wheeler*, 179 U.S. 141, 150 (1954) (*citing Hawkins Point Lighthouse Case*, 39 F. 77 (1889)); *State v. Trudeau*, 139 Wis. 2d 91, 101, 105, 408 N.W.2d 337 (1987) (absolute title to lakebeds, including the Great Lakes, passed to the state upon statehood); *Delaplaine and another v. The*

C. & N.W. R'y Co., 42 Wis. 214, 225-26 (1877) (for lakes, riparian owner takes only to the ordinary high-water mark, the state is the proprietor of the lakebed, and the water's edge is the boundary of the riparian owner's title); *Diedrich,* 42 Wis. at 248 (title of riparian owners of land bounded by Lake Michigan go to the natural shore of the lake, title to the lakebed is in the public, and rule that riparian owner's title does not extend beyond the natural shore was affirmed as far back as *Mariner v. Schulte*, 13 Wis. 775 (1861)). The right we all possess to use public lands is not the "property" of any one proprietor. *College Sav. Bank v. Florida Prepaid Postsecondary*, __ U.S. __, 119 S. Ct. 2219, 2224 (1999).

It is equally settled federal and state law that the state controls the use of the water above the bed under the public trust doctrine, and that a riparian owner's right to develop its riparian property is subordinate and subject to public rights in navigable waters. This Court so stated in 1892 in *Illinois Central*, 146 U.S. at 452-55 (a state may at any time reassert its title over the beds of navigable waters and never loses control over the waters above the beds), and R.W. Docks cites no authority to the contrary.

In Wisconsin, the public trust doctrine emanates from art. IX, § 1 of the Wisconsin Constitution. Article IX, § 1 of the Wisconsin Constitution provides that:

> [T]he river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impose or duty therefor.

As the public trust doctrine has developed, the array of public rights that it protects has expanded to include, in addition to commercial navigation, a variety of purely recreational and

nonpecuniary uses including boating, swimming, fishing, hunting, recreation, and scenic beauty. *Gillen v. City of Neenah*, 219 Wis. 2d 806, 820, 580 N.W.2d 628 (1998); *State v. Bleck*, 114 Wis. 2d 454, 465, 338 N.W.2d 492 (1983); *Hixon v. Public Service Comm.*, 32 Wis. 2d 608, 619, 632, 146 N.W.2d 577 (1966); *Muench v. Public Service Comm.*, 261 Wis. 492, 507-08, 511-12, 53 N.W.2d 514, 55 N.W.2d 40 (1952).

The public trust doctrine calls on the state to protect and preserve the state's natural resources for the enjoyment of its citizens. *Wis. Environmental Decade, Inc. v. DNR*, 85 Wis. 2d 518, 526, 271 N.W.2d 69 (1978) ("'public trust' duty requires the state not only to promote navigation but also to **protect and preserve its waters** for fishing, hunting, recreation, and scenic beauty") (emphasis added); *Just v. Marinette County*, 56 Wis. 2d 7, 16-18, 201 N.W.2d 761 (1972) (under the trust doctrine the state has an active duty not only to promote navigation and **protect and preserve navigable waters** for fishing, recreation, and scenic beauty, but also to eradicate and prevent pollution, and to **maintain the natural environmental status quo**) (emphasis added); *State ex rel. Chain O'Lakes Protective Ass'n v. Moses*, 53 Wis. 2d 579, 582, 193 N.W.2d 708 (1972) (the trust doctrine sees all natural resources in the state as impressed with a trust for **usage and conservation as a state resource**) (emphasis added); *Reuter v. DNR*, 43 Wis. 2d 272, 277, 168 N.W.2d 860 (1979); *Zealy v. City of Waukesha*, 201 Wis. 2d 365, 382, 548 N.W.2d 528 (1996) (Wisconsin has a long history of **protecting** its water resources).

The rights of riparian owners are qualified by the public trust doctrine, and are subordinate and subject to the paramount interest of the state and the paramount rights of the public in navigable waters. *Bleck*, 114 Wis. 2d at 467-68; *Mayer v. Grueber*, 29 Wis. 2d 168, 173-74, 138 N.W.2d 197 (1965); *Att'y Gen. ex rel. Becker v. Bay Boom Wild Rice & Fur Co.*,

172 Wis. 363, 375, 178 N.W. 569 (1920); *Boorman v. Sunnuchs*, 42 Wis. 233, 242 (1877).

The public trust doctrine imposes an affirmative duty on the state to protect public rights in navigable waters. It is not, as asserted by R.W. Docks in its petition at 16-17, a restriction on the state's ability to hinder navigation. To the contrary, the policy of the common and statutory law that recognizes the rights of the public to enjoy navigable waters is to be broadly and beneficently construed. *Muench*, 261 Wis. at 512; *Diana Shooting Club v. Husting*, 156 Wis. 261, 271-72, 145 N.W. 816 (1914).

The public trust doctrine is therefore broader than the federal navigational servitude (petition at 16), which may be more strictly limited to navigation. *Palm Beach Isles Association v. U.S.*, 208 F.3d 1374, 1384 (Fed. Cir. 2000). Nevertheless, the federal navigational servitude is a defense to a taking claim against a federal action that protects federal navigational interests. *Id.* at 1384; *Lucas*, 505 U.S. at 1028-29; *Marks v. U.S.*, 34 Fed. Cl. 387, 403 (1995) (citing a series of U.S. Supreme Court cases in support of this proposition), *affirmed* 116 F.3d 1490 (Fed. Cir. 1997).[2] Similarly, the public

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[2] R.W. Docks erroneously cites to *Kaiser Aetna v. United States*, 444 U.S. 164, 172 (1979) to suggest otherwise (petition at 17). This Court there stated that the navigational servitude is not a defense to a taking claim when Congress "exercises its Commerce Clause authority to promote navigation." *Id.* No such exercise of Commerce Clause authority has occurred here. Moreover, the Commerce Clause authority to regulate is not a background principle of property law, inherent in one's title, as is the public trust doctrine. In *Kaiser Aetna* the owner of a private pond invested in substantial improvements, which included connecting its private property to navigable water, and thereby was made to relinquish a fundamental element of its property rights, the right to exclude. 444 U.S. at 176-181. This Court held that that forced relinquishment amounted to a physical invasion requiring compensation. *Id.* Here, by contrast, none of R.W. Docks' private property is implicated by the regulatory decisions it challenges, none of its property rights have

trust doctrine is a defense to a taking claim against a state action that protects public rights embraced by the doctrine. *See Illinois Central*, 146 U.S. at 452-5 (the control of the state for the purposes of the public trust is different from the state's title in lands open to sale and can never be lost).

R.W. Docks' assertion, in its petition at 11, that the public trust doctrine does not create legal rights misrepresents the holding in the case it cites in support. The Wisconsin Supreme Court stated in *State v. Deetz*, 66 Wis. 2d 1, 13, 224 N.W.2d 407 (1974), only that the public trust doctrine does not provide a cause of action. More significantly, R.W. Docks' assertion is misplaced—if nothing else, it is clear that the public trust doctrine limits private rights, and that limitation is an encumbrance on private title, despite R.W. Docks' unsupported assertion to the contrary, in its petition at 14.

The public trust doctrine as a public trust encumbrance on a riparian owner's title is a long-standing and widely recognized rule of property in Wisconsin. Wisconsin, "by judicial authority so long acquiesced in as to become a rule of property," quite early established that riparian title is subject to public rights by vesting title to beds in the state in trust for all the people's use. *Franzini v. Layland*, 120 Wis. 72, 81-82, 97 N.W. 499 (1903). The public trust is part of the "organic laws of our state," originating before statehood. *Diana,* 156 Wis. at 269, 271. The rights of citizens under the public trust doctrine are "entitled to all the protection which is given financial rights." *Muench*, 261 Wis. at 511-12.

The public trust rule of property law is reflected in state nuisance law. The common law nuisance of jeopardizing public rights in state waters has been codified by statutes that authorize the state to abate as nuisances activities that violate the public interest in state waters. *Gillen*, 219 Wis. 2d at 832-

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been relinquished as a result of those decisions, and certainly no fundamental element of those rights, has been affected at all.

33; *Hixon*, 32 Wis. 2d at 616. The placement of structures in and the removal of materials from a lake are regulated in Wis. Stat. ch. 30 (which codifies the public trust doctrine, *Trudeau*, 139 Wis. 2d at 101), and have been so regulated since 1905 (despite R.W. Docks' suggestion to the contrary, in its petition at 14 and 16). A violation of that chapter is a nuisance as defined by Wis. Stat. § 30.294, and the state is authorized to abate such a nuisance under Wis. Stat. §§ 30.294 and 30.03. Under Wisconsin law and as found in the administrative and judicial decisions that upheld the denial of the contract and permit R.W. Docks sought, the use it proposed was indeed noxious, contrary to its assertion in its petition at 14. Because the denial of R.W. Docks' applications prevented a violation of the public trust and Wis. Stat. ch. 30, it prevented a public nuisance. Therefore, it cannot constitute a taking.

In sum, the Wisconsin Supreme Court's use of the public trust doctrine does not evade or abrogate this Court's taking analysis (petition at 13 and 17). Rather, that analysis does not apply to property rights not held. This Court's decisions, from *Illinois Central* to *Lucas*, and a long line of Wisconsin case law, together confirm that the public trust doctrine is a background principle of state property law that limits private property rights.[3]

R.W. Docks' complaint that this insertion of the public trust doctrine into taking analysis expands the narrow "background principle of state property law" rule in *Lucas*

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[3] As R.W. Docks concedes in its petition at 16, this Court's most recent taking case, *Palazzolo v. Rhode Island*, __U.S.__, 121 S. Ct. 2448 (2001), contains nothing to alter this longstanding proposition. Similarly, the 4 cases from other states that R.W. Docks cites in its petition at 13, all of which concern the transfer of lakebed owned by the states at statehood, follow the public trust law set out by this Court in *Illinois Central*. The statement in *Illinois Central* that states may have to pay for improvements made under such lakebed grants, 146 U.S. at 455, which R.W. Docks notes in its petition at 13, is consistent with the public trust doctrine as a limitation on private property rights otherwise.

(petition at 14) is a tautology. The same complaint could be made of any encumbrance on private title that constitutes such a principle. What R.W. Docks is really arguing is that this Court cannot mean what it said in *Lucas*, and that this Court should take this case to liberate taking claims from the background principles of state property law that currently thwart them. To do so would be to turn state property law on its head.

2. R.W. Docks also faults the Wisconsin Supreme Court for analyzing its taking claim with respect to its entire riparian property and adjacent marina, rather than with respect to each of the 71 slips yet to be developed. The Wisconsin Supreme Court declined to follow the one federal court to consider segmenting contiguous property, under a "partial taking" theory (*Loveladies Harbor, Inc. v. U.S*, 28 F.3d 1171 (Fed. Cir. 1994)), in part because the private property right asserted here—the subordinate riparian right of reasonable access—was so limited. P-Ap. 15. Moreover, unlike in *Loveladies*, 28 F.3d at 1183, no part of R.W. Docks' marina was developed before the regulatory restrictions were in place. R.W. Docks identifies no decision by this Court that would countenance the approach it advocates in this case.

To the contrary, the Wisconsin Supreme Court's reference to the contiguous property as a whole in this case is mandated by the decisions of this Court in *Penn Central*, 438 U.S. at 130-31, *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979), *Concrete Pipe & Products v. Construction Laborers Pension Trust*, 508 U.S. at 644, and *Dolan v. City of Tigard*, 512 U.S. 374, 385 n.6 (1994).[4] It is the approach suggested by R.W. Docks that threatens "the integrity" (petition at 22) of this

[4] The court's consideration of the marina as a whole also tracks this Court's suggested analysis in *Lucas*, 505 U.S. at 1016, n.7, because it is consistent with Wisconsin's law of property, as outlined above.

line of cases, not the decision of the Wisconsin Supreme Court.

Because this case involves public property, along with private rights "encumbered by the public trust doctrine and heavily regulated from the get-go" (P-Ap. 16), this case does not properly frame the partial taking issue raised by R.W. Docks in its petition. That issue, which is how and to what extent contiguous private ownership can be subdivided into separate pieces, is not presented in this case.

3. It is telling that R.W. Docks never identifies the private property that it lost, or the private property rights that were taken from it. If R.W. Docks' taking claim succeeds, then any riparian developer unlikely to obtain a permit for all it wishes to do along its property will have carte blanche to proceed with the part that will be permitted and then be compensated for the part that, ultimately, is not permitted. That result will render the permitting structure and the public trust it protects meaningless. The Wisconsin Supreme Court prevented such an absurd result and properly ruled that R.W. Docks suffered no unconstitutional taking from the permit denial, because it retained the economic benefit and use of the 201 slips and related improvements at the marina and on its riparian property, and because the effect on its riparian right of reasonable access, subject to the public trust doctrine, was at most negligible.

CONCLUSION

For all the reasons stated above, the State of Wisconsin requests that this Court deny the petition.

Respectfully submitted,

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APPENDIX

APPENDIX

Table of Contents

Item	Page
Findings of Fact, Conclusions of Law and Order of Division of Hearings and Appeals, dated 8/19/96 (1996 Order)	1a-16a
Findings of Fact, Conclusions of Law and Order of Division of Hearings and Appeals, dated 9/12/97 (1997 Order)	17a-26a
Decision and Order of Dane County Circuit Court, *R.W. Docks & Slips v. Wisconsin Department of Natural Resources,* dated 5/29/97 (1997 Decision)	27a-44a
Findings of Fact and Permit of Department of Natural Resources, dated 5/19/69	45a-48a
Findings of Fact, Conclusions of Law and Order of Department of Natural Resources, dated 5/19/72	49a-54a
Permit Mailing List, Letter to Robert Holmgren dated 6/19/95, and Dock Permit dated 6/29/95 for R.W. Docks & Slips	55a-64a
Letter to Robert Holmgren from Department of Natural Resources dated 12/30/68	65a-66a
Findings of Fact and Permit of Department of Natural Resources dated 5/12/72 (excerpt, p.2)	67a-68a
Second Supplemental Affidavit of Robert F. Holmgren dated 8/19/99	69a-71a

BEFORE THE
STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

Application of R. W. Docks & Slips) to Dredge Material From the Bed of) Lake Superior, Town of Bayfield,) Bayfield County, Wisconsin)	Case No. 3-NW-84-101
Application of R. W. Docks & Slips) to Place Dock Structures on the Bed) of Lake Superior, Town of Bayfield) Bayfield County, Wisconsin)	Case No. 3-NW-95-04022

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

R. W. Docks & Slips, 18855 Ridgewood Road, Wayzata, Minnesota 55391, applied to the Department of Natural Resources for permits to dredge material from and construct a pier on the bed of Lake Superior in Government Lot 3, Section 22, Township 50 North, Range 4 West, Bayfield County, Wisconsin. The proposed project consists of the construction of a pier designated as Dock 5 in the Port Superior Marina. The main dock will extend into the bay for approximately 90 feet, adding approximately 50 slips to the existing marina. Further, three proposed 24 foot finger piers located on the easterly side of Dock 5 would create six additional boat slips. The main dock is eight feet in width, the finger piers are four feet in width, and both will be constructed of treated wood planks

supported by a foam-filled polyethylene float system. The pier will be anchored with oak pilings.

Further, at hearing the applicants amended their application to include the further expansion of Dock 4 as set forth below. The hearing was continued for over one month to allow the Port superior Village Association and other objectors time to prepare to respond to the amended application.

The dredging project would involve removal of 15,000 cubic yards that would extend beyond the footprint of the proposed Dock 5 expansion to permit completion of the marina as platted.

The Department of Natural Resources issued a Notice of Pending DNR Permit which stated that unless written objection was made within 30 days of publication of the Notice, the Department might issue a decision on the permits without a hearing. Several timely objections were received by the Department.

On August 18, 1995, the Department forwarded the file to the Division of Hearings and Appeals for hearing.

Pursuant to due notice hearing was held on September 19-20, and November 19, 1995 at Ashland and Washburn, Wisconsin before Jeffrey D. Boldt, Administrative Law Judge (ALJ). The parties submitted written briefs and the last brief was received on June 6, 1996.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

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FINDINGS OF FACT

1. R. W. Docks & Slips, 18855 Ridgewood Road, Wayzata, Minnesota 55391, completed filing an application with the Department for a permit under sec. 30.12, Stats., to expand existing marina pier facilities on the bed of Lake Superior, Town of Bayfield, Bayfield County. The Department and the applicants have fulfilled all procedural requirements of secs. 30.12 and 30.02, Stats.

2. The applicants own real property located in Government Lot 3, Section 22, Township 50 North, Range 04 West, Bayfield County. The above-described property abuts Lake Superior which is navigable in fact at the project site. The applicants own approximately 1100 feet of riparian frontage and place between 191 and 198 boat slips on five existing structures.

3. The applicants propose to expand the existing marina facilities as follows the main dock would be extended into the water approximately 90 feet and Dock 5 as identified on Exhibit 8 would be installed, adding 50 pier slips to the existing marina facility. Further, three proposed 24 foot long finger piers on the easterly side of Dock 5 would create six additional boat slips. (See: Ex. 8) In addition, at commencement of the hearing the applicant stated that it was also seeking to expand existing Dock 4 to include 22 more slips as contemplated in the original design of the marina. At present, pier slips 174-198 on Dock 4 have been authorized; the proposal would expand Dock 4 to include slips 199-220. (Ex. 8) The piers would be anchored with oak pilings. Said piers would be constructed of treated wood planks supported by a foam-filled polyethylene float system.

4. The project also involves a separate application for a dredging contract pursuant to sec. 30.20, Stats. The proposed dredging would involve removal of more than 15,000 cubic yards and would extend beyond the footprint of the proposed Dock 5 expansion as set forth on the plat map. The dredging contract application is before the Division upon remand by the Dane Circuit Court following a review by the Wisconsin Court of Appeals in case #87-2079 [Ex. 1, #14; See: R.W. Docks v. DNR, 145 Wis. 2d 854, 429 N.W.2d 86 (Wis. Ct. App. 1988)] The applicant originally proposed to dredge 20,000 cubic yards; the Department approved 5,000 cubic yards. The instant application relates to the remaining
15,000 as set forth in Exhibit 1, #9.

5. The applicant raised numerous issues relating to whether the emergent weed-beds in the proposed project area pre-dated the installation of the existing breakwater. The record was clear that there have long been submergent weeds in the area of the project site. Dr. Meyer was able to detect aquatic vegetation in the 1938 aerial photo of the site, although he was unable to detect whether any of these plants grew above the water line. (Meyer Depo., p. 19) Meyer rendered similar opinions regarding 1965, and 1975 aerial photos. Dr. Meyer was able to detect emergent vegetation in post-breakwater 1979, 1983 and 1990 photos. The applicant also offered the testimony of an engineer, Mr. Toro-Escobar, which suggested that the breakwater facilitated deposit of sediment west of the structure in the area which now supports a wide variety of emergent as well as submergent plants. The record as a whole supports the reasonable inference that construction of the existing breakwater has facilitated the growth of emergent plants in the area of the proposed project.

However, there is no dispute that the area has long supported aquatic vegetation that has provided habitat for fishery and other aquatic life. Mr. Powers remembered fishing the northern end of the weed bed for northern pike in the 1930's. Department staff reports from 1984 reported the environmental significance of the weed bed for fish spawning, nursery, feeding and protective cover. (Exhibits 15 and 36)

While the historical development of the site is interesting, the applicant overstates the significance of the breakwater to the present balancing between public and private rights at the project site. The issue with respect to the 30.12, Stats. permit is whether it would be "not detrimental to the public interest" in navigable waters under the present circumstances. The issue with respect to the dredging contract is whether approval of the contract would be "consistent with public rights." Given the environmental significance of the currently existing weed bed, public rights in public waters would be detrimentally impacted by the loss of rare fish and wildlife habitat, and destruction of macroinvertabrate, mussels and zooplankton communities. Dredging of this environmentally rich area would not be consistent with public rights in maintaining and preserving the state's natural resources. (See: Findings 7-10)

7. Bruce Swanson, the DNR Area Fish Manager, netted and electro shocked fish in the aquatic vegetation bed that would be severely reduced if R. W. Docks is allowed to expand its structures as set forth above. In his report, Swanson concluded that granting the application for a permit would ". . .result (in) a major loss of a very unique remnant habitat in an area which previously supported much more aquatic weed beds. . ." Swanson further opined as follows: " The current bed supports at least 28 species and some in very large

abundances. These beds are very limited in Wisconsin's Lake Superior shore. This bed represents 10-20% of what now exists on Wisconsin's Lake Superior shoreline. I feel it plays a very strong role in the life history of the Pike's Creek northern pike population, which reach trophy size (10-20 lbs.). The proposed dredging of the bed would not only result in the loss of this fish oasis and its scenic beauty, but the further depletion and even the potential demise of the remnant Pikes Creek northern pike spawning population." (Ex. 47)

A clear preponderance of the credible evidence indicates that the proposed project would result in detrimental impacts to fishery values. A preponderance of the credible evidence established that the area of the proposed dredging provides important habitat for game fish, forage fish and the associated macroinvertebrates and zooplankton.

8. The aquatic plant community in the proposed project site constitutes a rare environmental resource on the south shore of Lake Superior.

Dr. Emmet Judziewicz has been working on a specific project to explore the southern shoreline of Lake Superior to assess the aquatic macrophyte communities. He pointed out, in Exhibit 31, that there are only six communities of aquatic plants similar to this one on the Lake Superior shoreline. He also noted, in Exhibit 29, that he observed the rare "delicate water milfoil" at this site and that:

> "Compared with other aquatic macrophyte communities observed. . . the community at Pikes Bay was unique and more valuable in three ways:

1. The greater number of submergent species present;

2. The presence of a rare species;

3. The exceptional "cleanness" of the macrophytes.

> Aesthetically, this community has high values. The view from a canoe down into the submergent aquatic bed is outstanding, with a green garden of pondweeds and water milfoils sharply visible through several feet of exceptionally clear water.
>
> The Pikes Bay macrophyte bed has unique floristic and vegetative features that are not, to my knowledge, duplicated elsewhere in Wisconsin's Lake Superior waters. Its partial or total destruction would represent a significant loss to the plant biodiversity of the region and the state." (Exhibit 29)

A preponderance of the credible evidence has shown that there has long been a bed of aquatic plants that are environmentally significant to the eco-system in and around the project site. It would not be consistent with public rights or the public interest in navigable waters to allow the destruction of these through the dredging of this area.

9. The proposed project would have a detrimental impact on wetland functional values in the area. DNR Area Water Management Specialist, Duane Lahti,

reviewed this project under NR 103, Wis. Admin. Code, which are the State's wetland water quality standards. Every project which may affect a wetland must be reviewed pursuant to this chapter. (See: secs. NR 103.01, 103.06 and 103.08)

Mr. Lahti concluded that this project does not meet the requirements of NR 103 and that the project, if authorized, would adversely affect the functional values of this wetland. Specifically, the project would injure fish and wildlife habitat, floral diversity, shoreline protection, and natural scenic beauty. Lahti noted further that rare mussel and plant species are also found at the site. Lahti concluded that, ". . . Dredging and dock construction would cause severe damage to the functional values of this wetland complex." (See: Ex. 41)

10. Numerous Department witnesses testified concerning the cumulative impacts which would occur on the scarce aquatic plants and habitat in Lake Superior if projects such as this are permitted. The loss of any of the few remaining intact remnant habitats would diminish the protection and preservation of Lake Superior as a natural and public resource.

11. The Department raised issues relating to the boat slip units being leased for 99 year period and offered under Chapter 703, Stats., which is the Condominium Ownership Act. The instant hearing was not noticed nor intended to address whether the existing 191 slips currently at the project site are maintained in accordance with the public trust doctrine. These matters involve significant issues relating to individual property interests and public rights and must be addressed in a separate proceeding. However, in the event that this decision is overturned upon appeal, a permit condition requiring compliance with sec.

NR 326.04(08), Wis. Admin. Code, should be established. Such a permit condition would require that all new slips be made available to the public by virtue of seasonal rental of boat slips. (Id.)

12. The proposed structures will not materially obstruct existing navigation on Lake Superior. The proposed piers are in a protected bay and outside the usual pattern of navigation on the lake. However, proposed Dock 5 would have a detrimental impact on the rights of neighboring riparians. (See: Finding 14)

13. There is a dispute over the riparian status of the applicant as it relates to the proposed construction of Dock 5. (See: Ex. 8) Port Superior Village Association, Inc. (PSVA) contends that it is the riparian owner of the land contiguous to the proposed Dock 5. PSVA does not have a deed which conveys and warrants this strip of property to PSVA. Legal title to this land instead appears to belong to Port Superior Marina Association, Inc. (PSMA) by virtue of a June 22, 1987 Warranty Deed conveyed to PSMA by Mr. Holmgren. (Ex. 52) Further, PSMA has paid taxes on the strip during the period from 1987 to 1994. (Ex. 72)

PSVA argues that it has acquired a property interest in the small riparian strip by virtue of: a.) adverse possession; or, b.) because a bulkhead line, established but not recorded, indicates that the strip of land between the bulkhead line and the quay is legally part of the lake bed and can not be relied upon by PSMA to establish riparian status. Instead, PSVA argues, the proper riparian owner is the owner of the land immediately behind the bulkhead line, namely PSVA.

The Division lacks jurisdiction to determine claims of "adverse possession," and other matters seeking an essentially equitable remedy that establishes ownership by means other than a valid legal title. These matters are properly brought in circuit court. Accordingly, the ALJ does not address PSVA's claims to own the riparian lands by virtue of adverse possession. Similarly, it is not for an administrative agency to decide the legal effectiveness of an improperly recorded bulkhead line as it relates to property rights not otherwise established by a claim of title. Further, these issues are only relevant to this proceeding in the context of whether or not the applicant has carried its burden of proof that it has riparian status sufficient to warrant a permit under sec. 30.12, Stats. The issues raised by PSVA raise legitimate concerns about the riparian status of PSMA, which is not even on record as a co-applicant for the requested permit. PSMA indicates in its brief that it supports the instant permit application. From this, it is probably safe to assume that PSMA would consent to being a co-applicant for the instant permit as it relates to the proposed construction of Dock 5.

However, the issues raised by PSVA have sufficient merit that, in the event this decision is overturned on appeal, any permit issued should require two separate permit conditions to address these concerns. First, that PSMA be made a co-applicant for the permits as they relate to proposed Dock 5; second, that the co-applicants establish by affidavit that there are no pending list pendens or other claims disputing ownership of riparian lands contiguous to proposed Dock 5.

14. The proposed construction of Dock 5 would interfere with riparian interests of neighboring riparians, specifically the lagoon access channel made use of by PSVA residents. (See: Photo Exhibit 26) This narrow channel,

approximately 40 feet wide, has long provided access to Lake Superior to PSVA condominium unit owners who moor numerous boats in the lagoon.

The applicant acknowledges that Dock 5 would have an impact on PSVA boaters, and proposes that these concerns could be eliminated by not installing pier slip units 222, 224, 226 and 228. (Exhibit 8) Further, the applicant would address the concerns of the 24-unit PSVA condominium owners by a proposal for yet more dredging of a new channel to the right of proposed Dock 5. Further maintenance dredging in the area would also be required, creating additional expense and uncertainty of access for PSVA owners.

The record as a whole indicates that Dock 5, even under the modified proposal of the applicant, would interfere with fundamental access rights of PSVA owners.

15. The applicants are financially capable of constructing, maintaining, monitoring or removing the structures if it should be found in the public interest to do so.

16. The proposed structures will not reduce the effective flood flow capacity of Lake Superior upon compliance with the conditions in the permit.

17. The proposed structures will not adversely affect water quality nor will they increase water pollution in Lake Superior. The structures will not cause environmental pollution as defined in sec. 144.01(3), Stats.

18. The Department of Natural Resources has complied with the procedural requirements of sec. 1.11,

Stats., and Ch. NR 150, Wis. Admin. Code, regarding assessment of environmental impact.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority under secs. 30.12 and 227.43(1)(b), Stats., and in accordance with the foregoing Findings of Fact, to issue or deny an application for a permit for the construction and maintenance of structures on the bed of navigable waterways.

2. Section 30.13(1), Stats., provides in pertinent part that:

> CONSTRUCTION ALLOWED WITHOUT PERMIT UNDER CERTAIN CIRCUMSTANCES. A riparian proprietor may construct a wharf or pier in a navigable waterway extending beyond the ordinary high water mark or an established bulkhead line in aid of navigation without obtaining a permit under sec. 30.12 if all of the following conditions are met:
>
> > (a) The wharf or pier does not interfere with public rights in navigable waters.
> >
> > (b) The wharf or pier does not interfere with the rights of other riparian proprietors. . ..

The proposed project does not meet the conditions necessary to allow construction of the project without a structures permit under sec. 30.12, Stats because the project will have an impact on the rights of both the public and of neighboring riparians.

3. The applicant is a riparian owner of some of the proposed project area within the meaning of sec. 30.12, Stats. However, there is some dispute as to its riparian status as to lands contiguous to Dock 5. (See: Finding 13)

4. The proposed piers described in the Findings of Fact constitute "structures" within the meaning of sec. 30.12, Stats.

5. The applicants have the burden of proof that the proposed pier structures would be not detrimental to the public interest in navigable waters. Village of Menomonee Falls v. DNR, 140 Wis. 2d 579, 605, 412 N.W.2d 505 (Wis. Ct. App. 1987)

6. The applicants have not carried their burden of proof as set forth above. Specifically, there would be detrimental impacts to the public interest in fishery values, protecting and maintaining the environment for plant and wildlife in the destruction of the weed bed as described above.

7. Section 30.20, Stats., provides that no person may remove material from the bed of a navigable lake or from the bed of any outlying waters without a contract. Subsection (2) provides, in pertinent part, that:

> (2) CONTRACTS FOR REMOVAL. (a) The department, whenever consistent with public rights,

> may enter into contracts on behalf of the state for the removal of any material from the bed of any navigable lake or any of the outlying waters . . . .. (Emphasis added)

This provision clearly indicates that the department "may" within its discretion, enter into contracts if it is "consistent with public rights" in navigable waters.

The proposed dredging project would not be "consistent with public rights" because it would result in detrimental impacts to fishery values, aquatic vegetation and wildlife habitat.

8. The proposed piers would meet the design standards of NR 326.04(7), Wis. Admin. Code.

9. It is not clear that the proposed project would meet the public access requirements of NR 326.04(08), Wis. Admin. Code. If this decision is reversed upon appeal, a permit condition establishing such compliance should be established.

ORDER

WHEREFORE, IT IS HEREBY ORDERED that the proposed dredging contract and proposed marina expansion be DENIED.

Dated at Madison, Wisconsin on August 15, 1996.

STATE OF WISCONSIN
DIVISION OF HEARINGS
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By /s/
Jeffrey D. Boldt
Administrative Law Judge

BEFORE THE
STATE OF WISCONSIN
Division Of Hearings And Appeals

Application of R.W.Docks & Slips to Dredge Material From the Bed of Lake Superior, Town of Bayfield, Bayfield, County, Wisconsin	Case No. 3-NW-84-0101
Application of R.W. Docks & Slips to Place Dock Structures of the Bed of Lake Superior, Town of Bayfield, Bayfield County, Wisconsin	Case No. 3-NW-95-04022

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
ON REMAND FROM DANE COUNTY CIRCUIT COURT

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding were certified as follows:

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Procedural History

On August 15, 1996, the Division of Hearings and Appeals issued Findings of Fact, Conclusions of Law and an Order denying applications for a permit under sec. 30.12, Stats., to place dock structures on the bed of Lake Superior and for a contract to dredge materials near a proposed marina expansion project. On September 13, 1996, a Petition for Judicial Review was filed in Dane County Circuit Court. On May 29, 1997, the Dane County Circuit Court (the Circuit Court) issued a Decision and Order holding that "the decisions . . . denying R. W. Docks a structure permit and a contract to dredge, are supported by substantial evidence." However, the Circuit Court held that ". . . the Administrative Law Judge failed to make any findings regarding estoppel. Therefore, this case is remanded to the Administrative Law

Judge for the narrow purpose of making findings on the issue of estoppel." (Circuit Court Order, p. 19)

By its very nature "equitable estoppel" involves powers of "equity" not normally held by administrative agencies. Administrative agencies have only such powers as are expressly granted to them or necessarily implied and any power sought to be exercised must be found within the four corners of the statute under which the agency proceeds. American Brass Co. v. State Board of Health, 245 Wis. 440 (1944). Any reasonable doubt as to the existence of an implied power in an agency should be resolved against it. Kimberly-Clark Corp v. PSC, 110 Wis. 2d 455, 462, 329 N.W.2d 143, 146 (1983). The Division does not claim for itself any "equitable" powers beyond the specific statutory authority to decide if the permit and contract applications met existing statutory standards. However, given the Remand Order of the Circuit Court, the ALJ will make Findings on the equitable issues which the Circuit Court, but not the ALJ, has authority to execute.

On July 10, 1997, a telephone conference call was conducted and all parties agreed that the narrow issue of equitable estoppel be decided on the basis of existing briefs previously submitted to the Division. On August 29, 1997, the Division gained possession of said briefs. This Decision is not based upon any briefs submitted to the Circuit Court.

FINDINGS OF FACT

1. This Decision incorporates by reference the Findings of Fact, Conclusions of Law and Order dated August 15, 1996.

2. There is no evidence in the record of any action or inaction by the DNR which induced reliance by R. W. Docks or its predecessor corporation to its detriment.

3. With respect to equitable estoppel, R. W. Docks argued *in toto* as follows in its "Memorandum in Support of Applications."

> In 1968, R. W. Docks & Slips applied for a permit to construct a breakwater for the purpose of creating a sheltered harbor including the proposed dredging area. It expended the money to construct this breakwater in reliance on the permit. In 1972, after prolonged negotiations with the department, R. W. Docks entered a settlement with the Department over a dispute as to the location of the shore of the lake. The settlement required the Department to issue a permit for the construction of a structure on the bed of Lake Superior. The structure, commonly referred to as the quay, is the anchor for Docks 4 and 5 which will occupy the dredging area. R. W. Docks would not have entered this settlement agreement if it knew that the Department would seek to prohibit it from completing these docks. Thus, all of the factors required for estoppel are clearly present, under these circumstances it would be inequitable for the Department to be allowed to prevent R. W. Docks from completing the marina." (2/13/96, Brief of R. W. Docks, p. 10)

4. The original enforcement actions and permits dealt with the area where Docks 1, 2 & 3 are located and the placement of the "quay" and dredging of the lagoon. Thus, only documents in the record are the permits for the dredging and placement of the "quay", for the dredging of the PSMA lagoon and the area where Docks 1, 2 & 3 are located. See Exhibit 1-7 and the "Plates" presented with that 1972 application. The record is clear that the permission granted to the applicant and its predecessors in the late 1960's and early 1970's were limited to discrete activities and had specific expiration dates.

In 1983, the applicant approached the Department with the current proposal to dredge 15,000 cubic yards of material from the current proposed project area to place docks 4 & 5. The Department quickly notified the applicants of its objections to the proposal and has since consistently maintained that position.

5. There is no specific language cited in the record which granted the applicants a prospective, unwritten permit to place structures on the bed of Lake Superior for boat slips sufficient to moor 272 boat slips. Indeed, even if the applicants had obtained a written permit authorizing construction of slips accomodating 272 boats, which they have not, the permit would have been void if it were not completed within the time period specified in the permit or within three years if no time period were specified. (Sec. 30.07, Stats.) The eleven year period between the 1972 settlement and the 1983 applications is longer than either the statutory expiration date or the two year period found in the other permits issued to the applicants and its successors.

6. There was no evidence of anything approaching "fraud" by the DNR. The applicant asserted that it was somehow "inequitable" for the Department to settle an enforcement action against the applicants for removing materials from the bed of Lake Superior and then not later grant the applicants a permit, over a decade later, for boat mooring slips. This argument is absurd and is likely "frivolous" within the meaning of sec. 814.025(3)(b), Stats.

7. In this matter a clear preponderance of the evidence indicated that the proposed dredging and construction would result in the destruction of an important and to large extent unique bed of aquatic vegetation on the south shore of Lake Superior.

Even if the three elements of estoppel and the further element of "inequitable" fraud by the government agency

were proven, the public interest in protecting this natural resource would likely outweigh any injustice to the applicant. However, because the applicants have not developed any alleged "fraud" nor specifically shown any action or inaction of the DNR which induced reliance by R. W. Docks to their detriment, it is difficult to speculate as to the nature of the alleged injustice is which would need to be balanced against the public benefit of maintaining a rare environmental resource.

DISCUSSION

The relationship between the 1972 settlement with respect to the location of the shoreline and the instant permit applications is not developed in the Applicant's brief nor in the record. The general rule in Wisconsin is that it is not necessary to rule on issues which are not adequately developed by the party in the record or in briefs. See: Truttschel v. Martin, 208 Wis. 2d 361, 369, 560 N.W.2d 315 (Wis. Ct. App. 1997) However, in this instance the ALJ has been Ordered by the Circuit Court to develop the applicant's arguments for them.

The best statement of the equitable estoppel argument is found in the 1987 Dane County Circuit Court decision. In the October 1, 1987, Dane County Circuit Court decision (the 1987 Circuit Court decision) R. W. Docks asserted that " . . . when (the) DNR granted the permit to construct the breakwater in 1972 it was with . . . full knowledge that the marina would be constructed with a total of 272 boatslips." (The 1987 Circuit Court decision, p. 12) In the 1987 Circuit Court action, R. W. Docks further alleged financial loss which it attributed to the DNR " . . . allowing it '. . . to detrimentally rely on the initial breakwater permit.'" (The 1987 Circuit court case, quoting the petitioner's memorandum)

This argument is missing several important linkages, none of which were developed in the record. First, under sec. 30.12, Stats., a permit is required for each structure on the bed of a navigable waterway which does not meet express statutory exemptions. The breakwater was evaluated pursuant to the statutory standards and a permit to construct the breakwater was issued on March 10, 1971. (Ex. 1, #3) At that time, another proposed breakwater structure was rejected because it would " . . . constitute an extension across adjacent riparian property." (Id.) It should have been apparent to the applicants that all structures would be evaluated individually on the basis of whether or not they met the statutory standards. Further, the permit specified that it applied only to the specific structures included in " . . . breakwater plan #2 and the two boat launching ramps as described in the foregoing findings of fact." (Id., p. 4) Finally, the breakwater and boat ramp permit was limited on its face to a period of ". . . two years from the date hereof, if (the) structures are not completed before such date." (Id.)

Similar language appears in the 1972 permit to place the solid pile quay structure on the bed of the lake. That permit included the following language " . . . the authority herein granted can be amended or rescinded if the structure becomes a material obstruction to navigation or becomes detrimental to the public interest." (Ex. 1, # 4) In the instant applications, the ALJ found that placement of the pier structure and the proposed dredging in an environmentally sensitive area would be detrimental to the public interest in navigable waters.

R. W. Docks asserts that the breakwater permits and the 1972 settlement which led to the "quay" structure permit, somehow indefinitely granted it rights in perpetuity to build other structures, not specifically and individually evaluated in terms of the statutory standards, on the bed of Lake Superior. However, any such "reliance" by R. W. Docks was unreasonable. The testimony in the record indicates that Port

Industries, Inc. . . . "got into economic problems in '72, '73, '74 and '75 and actually lost the marina as Port Industries in '76." (TR. p. 125) R. W. Docks assumed ownership in October, 1977. Mr. Robert F. Holmgren was the principal manager in both Port Industries, Inc., and R. W. Docks and Slips. A bank failure and other events kept Holmgren from pursuing completion of the project as he had hoped during this time period. (Id.) There is no evidence in the record indicating that the Department promised either Port Industries or R. W. Docks the right to place any number of pier slips at the marina. The Department would not have had authority to make such a promise without first pursuing the public noticing requirements of sec. 30.02, Stats. As with prior applications, the rights of the public and of neighboring riparians had to be considered in processing any future permit applications.

Any "reliance" to its detriment by the applicants was misplaced and "unreasonable" as a matter of law because its predecessor corporation had direct and first-hand knowledge of the DNR's permit evaluation procedure: 1) that all structures would be evaluated individually; 2) that all permits granted were limited by specific time periods.

Pursuant to statute, the DNR serves as " . . . the central unit of state government to protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private." Sec. 281.11, Stats. Pursuant to Chapter 30, Stats., the Department must evaluate discreet activities that require permits to ensure that proposed activities do not have a detrimental impact or public rights in public waters under existing environmental conditions. All of the prior permits, contracts and settlements granted to the applicants had no bearing on the likelihood of the grant or denial of the instant applications.

CONCLUSIONS OF LAW

1. An administrative agency is not a court of equity and possesses only such powers as are expressly granted to it or necessarily implied and any power sought to be exercised must be found within the four corners of the statute under which the agency proceeds. American Brass Co. v. State Board of Health, 245 Wis. 2d 440 (1944). The Division does not have authority to fashion equitable remedies and makes Findings and Conclusions in this instance by way of an extension of the equitable powers of the Dane County Circuit Court.

2. The three elements of equitable estoppel are as follows:

(1) Action *or nonaction* which induces (2) reliance by another (3) to his detriment.

In addition, the proof of estoppel must be clear and convincing and may not rest on conjecture. The Wisconsin Supreme Court has held that in order to estop the government, the government's conduct must be of such a character as to amount to fraud. The word fraud used in this context is not used in its ordinary legal sense; the word fraud in this context is used to mean inequitable:

> "The term 'fraud' used by the court is not to be construed here as it is used in the ordinary sense—as an artifice, a malevolent act, or a deceitful practice.
>
> "'The meaning here [in the application of the doctrine of estoppel] given to fraud or fraudulent is virtually synonymous with "unconscientious" or "inequitable."'

State v. City of Green Bay, 96 Wis. 26 195, 202, 291 N.W.2d 508 (1980).

The applicants have not shown any of the elements of equitable estoppel by clear and convincing evidence.

Further, even if the three elements of estoppel are proved, in order to estop a governmental entity, the court must balance the public interest at stake if the doctrine is applied against the injustice that might be caused if the estoppel doctrine is not applied. Id., p. 210

No "injustice" was demonstrated by the applicant. The public interest in maintaining a rare environmental resource would be given strong weight in any balancing of the unproven injustice and the public interest.

ORDER

WHEREFORE, the Division submits these Findings and Conclusions on the equitable estoppel issue which it was directed to consider on Remand from the Dane County Circuit Court.

Dated at Madison, Wisconsin on September 12, 1997.

STATE OF WISCONSIN
DIVISION OF HEARINGS
AND APPEALS
5005 University Avenue
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By: /s/
Jeffrey D. Boldt
Administrative Law Judge

STATE OF WISCONSIN DANE COUNTY
CIRCUIT COURT, BRANCH 15

R.W. DOCKS & SLIPS,

Petitioner,

v.

DECISION AND ORDER

Case No. 96-CV-2146

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Respondent.

Petitioner R.W. Docks & Slips (R.W. Docks), is seeking judicial review of a decision issued by respondent Wisconsin Department of Natural Resources (DNR) on August 15, 1996. R.W. Docks contends that the decision of the DNR was erroneous and violates a number of R.W. Docks' statutory and constitutional rights.

BACKGROUND

The following facts are undisputed in the record. The early history is provided for purposes of background, even though it may not be germane to the present action.

This case focuses on the further development of a marina located along the shore of Lake Superior in Wisconsin. R.W. Docks began working on the site in 1969. The marina is currently operated as a condominium—each boat slip is assigned a number and is treated as a discrete parcel of real estate. Five docks are planned, three and one half of which

have been completed. To date, approximately 201 slips have been developed and sold. R.W. Docks is seeking to develop the remainder of dock 4 and all of dock 5, and then sell an additional 71 slips.

In 1983, R.W. Docks applied to the DNR for a contract to dredge 20,000 cubic yards of material from Lake Superior. The DNR opposed this action due to environmental concerns. Eventually an agreement was reached whereby R.W. Docks broke its contract into two parts, and made an initial application to dredge 5,000 cubic yards. This application was approved. R.W. Docks' application to dredge the remaining 15,000 cubic yards was denied by the DNR on April 17, 1986.

R.W. Docks petitioned for judicial review of that decision on May 15, 1986. In a decision issued October 1, 1987, the circuit court ordered that the matter be remanded back to the DNR for an administrative hearing. The court's order also directed that certain issues be addressed at that hearing. The DNR appealed the circuit court's order. On July 21, 1988, the court of appeals affirmed the circuit court's order, with a minor modification.

The ALJ conducted a hearing on September 19-20, and November 19, 1995. The parties submitted written briefs.

On August 15, 1996, the administrative law judge issued an order denying R.W. Docks applications to dredge and to construct the new docks. R.W. Docks has petitioned for judicial review of that decision.

R.W. Docks asserts that the administrative law judge made numerous material errors of fact and law. The petitioner also asserts that the administrative law judge erred by not

ruling on all of the issues before him. Briefs have also been filed by other certified parties.[1]

STANDARD OF REVIEW

R.W. Docks has sought judicial review of an administrative agency's decision. R.W. Docks asserts that:

> There is no reason to comb the record for evidence supporting the Administrative Law Judge's Decision. The question is, rather, can the Department in the circumstances presented, deprive R.W. Docks of all economic use of its property.

Despite this assertion and pursuant to §227.57(1), Stats., judicial review is in fact limited to the record.[2] R.W. Docks did not bring an inverse condemnation claim, nor any other claim for damages pursuant to violations of either the Wisconsin or United States Constitutions. Such claims are simply not ripe. The issue that is before this court is not whether the DNR's action constituted a "taking" of R.W. Docks' property but whether the DNR's ruling is supported by substantial evidence in the record. Therefore, to the

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[1] These parties are: the Port Superior Village Association, Inc.; John Maloney; and the Port Superior Marina Association. To the extent that any of those parties make arguments not germane to the Chapter 227 proceedings, they will not be addressed.

[2] The court wishes that the petitioner had provided more than minimal citations to the record, to the transcript, and to supporting case law in support of its various arguments. In particular, the assertion "this is not what the cases say," (Petitioner's Reply Memorandum, p. 7) is wholly unsupported—the petitioner makes no effort to provide this court with: 1) any hint of the names or citations of the cases to which the petitioner intends that remark to apply; 2) any indication of what it believes the "cases" do say; or 3) any case citations in support of its own assertions—the only two cases cited in the petitioner's memoranda are not on point to the discussion out of which this remark arose. This places an undue burden on the court to do work that is more properly that of the petitioner.

extent that any of R.W. Docks' arguments concern issues not presently before this court those arguments will not be addressed.

This action was brought by R.W. Docks pursuant to §§ 227.52, 227.53, 227.40(2)(e), and 227.57, Stats. Chapter 227, Wis. Stats., outlines the procedures applicable to the review of a final decision of an administrative agency. Statutory certiorari review is to be conducted based on the record of the proceedings below. §227.57, Stats. The court is confined to the defects appearing upon the return, and evidence dehors the record, and contradicting it, is not permitted in the absence of statutory authority. State ex rel. Grant School Dist. v. School Bd., 4 Wis. 2d 499, 504 (1958), *citing* Morris v. Ferguson, 14 Wis. 266, 268 (1861), *other citations omitted.*[3]

Agency findings of facts will be upheld on appeal if the agency's findings are supported by substantial evidence. §227.57(6), Stats.; Omernick v. Dept. of Natural Resources, 100 Wis. 2d 234, 250 (1981), cert. denied 454 U.S. 883 (1982). Substantial evidence includes such "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Gilbert v. Wisconsin Medical Examining Bd., 119 Wis. 2d 168, 195 (1984), *citing* Bucyrus-Erie Co. v. DILHR, 90 Wis. 2d 408, 418 (1979).

In contrast, application of an agency's findings of fact to a statute is a question of law warranting independent review by the court. In the Matter of the Arbitration among Madison Landfills Inc. v. Libby Landfill Negotiating Comm., 179 Wis. 2d 815, 825 (Ct. App. 1993) aff'd 188 Wis. 2d 613 (1994). Questions of law are reviewable *ab initio* and are properly subject to judicial substitution of judgment. §227.57(5), Stats.; American Motors Corp. v. ILHR Dep't,

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[3] This restriction applies to the drawing contained in the brief of R.W. Docks.

101 Wis. 2d 337, 353-54 (1981). Nevertheless, courts accord varying degrees of deference to an administrative agency's interpretation of a statute it has been legislatively charged to administer. Carrion Corp. v. DOR, 179 Wis. 2d 254, 264-65 (Ct. App. 1993), *citing* West Bend Educ. Ass'n v. WERC, 121 Wis. 2d 1, 11-12 (1984). The general rule in Wisconsin is that "the construction and interpretation of a statute adopted by the administrative agency charged with the duty of applying it is entitled to great weight." Blackhawk Teachers' Fed'n Local 2308 v. WERC, 109 Wis. 2d 415, 421 (Ct. App. 1982), citing Beloit Education Ass'n v. WERC, 73 Wis. 2d 43, 67 (1976). The highest degree of deference should be paid to an agency's interpretation of a statute when that interpretation "is of long standing" or "entails its expertise, technical competence and specialized knowledge," or when "through interpretation and application of the statute, the agency can provide uniformity and consistency in the field of its specialized knowledge." Carrion, at 264-5. If the agency's interpretation is one among several reasonable interpretations that can be made which are consistent with the purpose of the statute, a court must affirm the agency's choice. DeLeeuw v. ILHR Dept., 71 Wis. 2d 446, 449 (1976). Courts, however, should not defer to an agency's interpretation of a statute when the court finds that the agency's interpretation "directly contravenes the words of that statute, is clearly contrary to legislative intent, or is otherwise unreasonable or without rational basis." Carrion, 179 Wis. 2d. at 265, *citing* Lisney v. LIRC, 171 Wis. 2d 499, 506 (1992). This standard of review is subject to various exceptions, as for instance, when the agency is interpreting a statute for the first or nearly the first time, or if there is no rational basis for the agency's conclusions. Blackhawk, at 422, citing Beloit, at 67-68.

DISCUSSION

1. Denial of Dredging Contract and Permit to Construct Floating Docks.

Ignoring, for the moment, the petitioner's arguments concerning estoppel, the basic issue before the ALJ was whether to grant to R.W.Docks a contract to dredge 15,000 cubic yards of material, and a permit to construct floating docks. The DNR asserts that it has the authority to prohibit dredging in the marina area, and to require structure permits.

The dredging contract was required pursuant to §30.20, Stats.[4] Under that statute, a contract is mandatory before dredging can begin, and the DNR may only enter into such contracts "whenever consistent with public rights." §§30.20(1)(a) and 30.20(2)(a), Stats. The permit for the docks was required under §§30.12, Stats.[5] Under that statute,

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[4] 30.20 Removal of material from beds of navigable waters

(1) Unlawful removal.

(a) No person may remove any material from the bed of any navigable lake or from the bed of any outlying waters of this state without first obtaining a contract as provided in sub. (2).

. . . .

(2) Contracts for removal.

(a) The department, whenever consistent with public rights, may enter into contracts on behalf of the state for the removal of any material from the bed of any navigable lake or any of the outlying waters, and for the lease or sale of the material. Every contract shall contain such conditions as may be necessary for the protection of the public interest and the interests of the state and shall fix the compensation to be paid to the state for material so removed . . . . No contract entered into under this paragraph may run for a longer period that 5 years.

. . . .

[5] §30.12 Structures and deposits in navigable waters prohibited; exceptions; penalty.

(1) General prohibition. Except as [otherwise provided], unless a permit has been granted by the department pursuant to statute or the legislature had otherwise authorized structures or deposits in navigable waters, it is unlawful:

a riparian owner must obtain from the DNR a permit before depositing any material or placing any structure upon the bed of any navigable waters. §30.12(1), Stats. The DNR may issue a permit to an applicant to build or erect such a structure if it finds that the structure does not materially obstruct navigation and is not detrimental to the public interest. §30.12(2), Stats.

After a hearing, and after the parties were given an opportunity to submit briefs, both the contract and the permit were denied. Because the arguments for each action overlap in many respects, the contract and the permit will be discussed together.

R.W. Docks asserts that "the hearing was conducted with a total misunderstanding of the applicable law and was therefore a waste of time and money [because t]he Department and the [ALJ] proceeded on the mistaken belief that if the proposed dredging had any impact whatsoever on the environment it could be proscribed." (Memorandum of Law of Petitioner R.W. Docks & Slips, p.6). R.W. Docks asserts that until 1983, it was routinely granted dredging contracts by the DNR in order to facilitate development of the marina. R.W. Docks contends that the DNR was overly concerned for the emergent weedbed, even though the weedbed only came into existence because of the

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(a) To deposit any material or to place any structure upon the bed of any navigable water where no bulkhead line has been established; or

(b) To deposit any material or to place any structure upon the bed of any navigable water beyond a lawfully established bulkhead line.

(2) The department . . . may grant to any riparian owner a permit to build or maintain for the owner's use a structure otherwise prohibited under sub. (1), if the structure does not materially obstruct navigation or reduce the effective flood flow capacity of a stream and is not detrimental to the public interest . . . .

construction of the breakwater.[6] R.W. Docks contends that dredging would remove only a minor part of the emergent weedbed because the main part of the weedbed is outside the proposed dredging area.

R.W. Docks also asserts that the marina has been developed on an incremental basis, and that no structure permits had ever previously been required by the DNR. (Memorandum of Law of Petitioner R.W. Docks & Slips, p. 3; Reply Memorandum, pp. 1-2) Whether or not the DNR had previously required such permits is not germane to this court's review of the ALJ's ruling.[7] Section 30.12(1), Stats. contains a general prohibition against placing any structures on the beds of navigable waters. Neither party disputes the ALJ's findings and conclusions that Lake Superior is navigable, and that the floating docks are "structures" within the meaning of the §30.12, Stats.[8]

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[6] Starting at page 8 of its Reply Memorandum, R.W. Docks makes a number of comments on the testimony of various witnesses. Although apparently sincere, these comments do not suffice to point to error on the part of the ALJ. R.W. Docks alludes to attempts to "engender a snail darter response" or invoke the "snail darter syndrome", concedes that the one unique mussel "must be lonely" but asserts that there is no scientific evidence that it is either threatened or endangered, and "comments that one or more witnesses simply "likes to look at weeds."

[7] The petitioner's assertion assumes that docks 1 to 3 are equivalent to proposed docks 4 and 5. The record does demonstrate that §30.12 permits had been required for certain parts of the marina, although not for the older docks. Exhibit 62, a letter dated July 12, 1971, from the DNR to Mr. Robert F. Holmgren, contains a reference to a §30.12, Stats. permit. Exhibit 65 (Record, Ex. 1-4), contains a copy of a §30.12, Stats. permit issued May 12, 1972, for construction of the breakwater. A further review of the record revealed no §30.12 permits for construction of docks 1 through 3; Exhibit 1-8 contains a reference that seems to imply they were built sometime before 1979 (see also, §30.122, Stats.) Whether or not permits were required in the past does not render the current permit process or requirment somehow per se invalid.

[8] §30.01 Definitions.

. . . .

In its Reply Memorandum addressed to the ALJ, dated April 8, 1996, R.W. Docks asserted that pursuant to the DNR's own administrative regulations contained in Wis. Adm. Code, sec. NR 326.05,[9] no structure permit is required. It seems clear that the proposed development would not be included in the provisions contained in §326.05, and R.W. Docks asserted that neither did the provisions of 326.04(1) or (9) apply because the piers would neither extend beyond the line of navigation (326.04(1)), nor be maintained with a screen (326.04(9)). These NR regulations were referenced in the Petition for Review filed in this case. Wis. Adm. Code, sec. NR 326.04, reads in pertinent part:

> (1) Except as provided un sub. (2) or (8), piers shall not extend into the water from the shoreline beyond the line of navigation or the length of the boat using the pier unless a need

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(5) "Pier" means any structure extending into navigable waters from the shore with water on both sides, built or maintained for the purpose of providing a berth for watercraft or for loading or unloading cargo or passengers onto or from watercraft . . . .

(8) "Wharf" means any structure in navigable waters extending along the shore and generally connected with the uplands throughout its length, built or maintained for the purpose of providing a berth for watercraft or for loading or unloading cargo or passengers onto or from watercraft.

Wis. Adm. Code, sec. NR 326.03 Definitions.

(7) "Pier" as defined in s. 30.01(5), Stats., means any structure extending channelward from the shore with water on both sides, built or maintained for the purpose of providing a berthing or mooring place for watercraft . . . .

[9] Wis. Adm. Code, sec. NR 326.05:

Riparians intending to construct solid piers, rock-filled cribs or similar types and size devices used as foundations, piers which extend beyond established pierhead lines, or piers not conforming to s. NR 326.04(1) or (9), shall apply for permits.

> can be demonstrated by the riparian that boats using the pier require a greater depth of water
> . . . .
> (8) Piers associated with marinas . . . . shall not extend into the water from the shoreline beyond the line of navigation unless a permit is obtained under s. 30.12(2), Stats. Such marinas shall be open to the public. Use of the facility by the public may be conditioned only on the payment of a reasonable mooring or anchoring fee.[10]

In its Finding of Fact No. 8, the ALJ stated that "in the event that this decision is overturned on appeal, a permit condition requiring compliance with sec. NR 326.04(08), Wis. Adm. Code, should be established." The record does not demonstrate that the proposed development is a public marina in the sense intended by the statute (it is in fact developed as a condominium, and it appears that slips are made available to the public by leases offered by individual slip owners—an arrangement more properly described as a private rental agreement). Although Mr. Holmgren testified that R.W. Docks did not intend to construct piers extending beyond the length of the boat using them (Trans. p. 508), that appears only to be true for the "finger" piers that are attached to the main dock section, but not to the main dock sections themselves (for example, according to the proposed plans, Dock 5, which would add an additional 50 slips to the marina, would extend 90 feet into the bay, and its main section is 8 feet wide) There is no evidence that the pier length is necessary merely to obtain a greater depth of water (presumably that is why the dredging contract is necessary in the first place). Referring to Exhibit 1-6, the DNR also points out that certain of those provisions "were specifically

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[10] The note to section 8 states that "As an example, the use of such an extended pier shall not be conditioned upon membership in a private club or organization, purchase of a parcel or property, or purchase of a boat.

enforced against the petitioner in 1971-2;" and would conceivably have provided R.W. Docks with notice of the requirements. Therefore, the conclusion of the ALJ requiring a permit under §30.12, Stats., is not clearly erroneous.

R.W. Docks asserts that additional error was committed when its mitigation offer was "totally rebuffed if not ridiculed." (Id. at 7-8.) Again, R.W. Docks does not point to, and this court cannot find, any authority that would mandate consideration, let alone acceptance, of a party's mitigation offer under the structure/dredging permitting processes. The court also notes that there is no evidence in the record indicating that the mitigation offers were ever the subject of ridicule.[11]

Without citing to the record, R.W. Docks asserts that the ALJ's finding of fact that "'[t]he record as a whole supports the reasonable inference that construction of the existing breakwater has facilitated the growth of emergent plants in the area of the proposed project compels a decision in favor of Petitioner." It is not clear whether the Petitioner believes this assertion is intended to apply to the dredging contract, to the structure permit application, or to both. The cited statement was contained in Finding of Fact No. 6. In that finding the ALJ went on to say that:

> [t]here is no dispute that the area has long supported aquatic vegetation that has provided habitat for fishery and other aquatic life . . . . While the historical development of the site is interesting, the applicant overstates the

[11] According to the petitioner's own memorandum, this offer amounted to a demand for compensation, and in the alternative, mitigation on the condition that the petitioner could name the wildlife refuge that would ostensibly be created. (Petitioner's Memorandum of Law, p. 8, citation to record omitted). The record, particularly the transcript of the testimony, seems indicative of a more reasoned and balanced offer of mitigation on the part of the petitioner.

> significance of the breakwater to the present balancing between public and private rights at the project site . . . .

R.W. Docks contends that the degree of harm to public lands is "extremely small." According to R.W. Docks, the ALJ "made no effort to determine the degree of harm to public lands" and erred by failing to consider the "social value" of the marina, and its suitability to the site. (Memorandum of Law of Petitioner R.W. Dock & Slips. at 7-8). However that is not the test required by the statute, and R.W. Docks is unable to point to, and this court cannot find, any statutory or common law authority for the petitioner's contention that the ALJ was required to consider the "social value" of the marina, or that the terms public rights and interest should be read so narrowly. Public rights and interests in navigable waters are not limited to navigation or riparian rights. The terms are more expansive, and encompasses a whole range of interests and rights, both incremental and cumulative, and including scenic and ecological values. *See, e.g.,* State v. Bleck, 114 Wis. 2d 454 (1983); and Just v. Marinette County, 56 Wis. 2d 7 (1972).

It is also critical to remember that both the issuance of a permit and the grant of a contract are within the discretion of the DNR. The permit requires a finding that structure is not detrimental to the public interest. §30.12(2), Stats. Similarly, the dredging contract must be consistent with public rights. §30.20(2), Stats. The ALJ stated in Finding of fact No. 6:

> The issue with respect to the 30.12, Stats. permit is whether it would be "not detrimental to the public interest" in navigable waters under the present circumstances. The issue with respect to the [30.20, Stats.] dredging contract is whether approval of the contract would be "consistent" with public rights.

> Given the environmental significance of the currently existing weed bed, public rights in public waters would be detrimentally impacted by the loss of rare fish and wildlife habitat, and destruction of macroinvertebrate, mussels and zooplankton communities. Dredging if this environmentally rich area would not be consistent with public rights in maintaining and preserving the state's natural resources. (See: Findings 7-10).

The ALJ found that the proposed project would have detrimental impacts to fishery values (Finding of Fact 7), would result in the destruction of a rare environmental resource with high aesthetic values (Finding of Fact 8), would have a detrimental impact on wetland functional values (Find of Fact 9), and poses significant cumulative impacts to the natural and public resource of Lake Superior (Finding of Fact 10). The ALJ separately found that the proposed construction of Dock 5 would interfere with the rights or interests of other other riparians (Finding of Fact 14). R.W.Docks was afforded an opportunity to challenge all of the findings.

Based on the above findings, the ALJ concluded that the proposed docks did not fall within any of the permit exceptions contained in §30.13, Stats,[12], and would impact

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[12] §30.13 Regulation of wharves, piers and swimming rafts; establishment of pierhead lines.

(1) Construction allowed without permit under certain circumstances. A riparian proprietor may construct a wharf or pier in a navigable waterway extending beyond the ordinary high-water mark or an established bulkhead line in aid of navigation without obtaining a permit under s. 30.12 if all of the following conditions are met:

(a) The wharf or pier does not interfere with public rights in navigable waters.

on the rights of the public and of neighboring riparians (Conclusion of Law 2). The ALJ also concluded that the proposed dredging project would not be consistent with public rights in navigable waters. (Conclusion of Law 7). Based on these and other conclusions, the proposed dredging contract and proposed marina expansion were denied.

Taken together, none of R.W.Docks' assertions make it appear that error was committed. The court finds that as documented by the ALJ, these findings are supported by substantial evidence in the record and the conclusions are not erroneous as a matter of law.

2. Did the hearing comport with the directions contained in the Circuit Court Order.

R.W.Docks contends that "This case . . . is governed by the Circuit Court's Order as modified by the Court of Appeals Decision." According to R.W. Docks, that order required that there be a full airing and a resolution of certain disputed and unresolved issues that had been asserted by R.W. Docks. Those issues were:

> 1) That the aquatic growth in question was created as a result of petitioner's earlier installation of a breakwater; 2) That ongoing

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(b) The wharf or pier does not interfere with rights of other riparian proprietors.

(c) The wharf or pier does not extend beyond any pierhead line . . . .

(d) The wharf or pier does not violate any ordinances enacted under sub. (2).

(e) The wharf or pier is constructed to allow the free movement of water underneath and in a manner which will not cause the formation of land upon the bed of the waterway.

. . . .

> siltation will adversely affect the weedbed, absent dredging; 3) That additional dredging will positively affect the entrophication [sic] in the area; and 4) That the weeds in question do not constitute rare "open water" vegetation.
>
> (Record, Ex. 1-13, p. 12)

The case now before this court is not governed by the prior court order, but by Chapter 227. Nevertheless, the court will address R.W. Docks' concerns. Reading the court order in its entirety reveals that the basis for that portion of the court order requiring a full hearing was the court's concern that because the permit process did not involve a contested hearing the petitioner had not been given an opportunity to submit countervailing evidence—the court therefore found the record to be insufficient to conduct a meaningful administrative review. In contrast, the present Petition for Judicial Review has come following a contested hearing, with an extensive record that demonstrates that the parties were given ample opportunities to submit evidence and countervailing evidence.

Regarding the first issue, whether the aquatic growth in question was created as a result of petitioner's earlier installation of a breakwater, the ALJ found that "The record as a whole supports the reasonable inference that construction of the existing breakwater has facilitated the growth of emergent plants in the area of the proposed project," but then concluded that the historical development of the site was not determinative of the balancing between public and private rights at the site. (Finding of Fact 6) As the ALJ's citations reveal, this conclusion is supported by the record and is not clearly erroneous.

Regarding the second issue, whether the ongoing siltation will adversely affect the weedbed, absent dredging, the evidence was at best inconclusive. The record

demonstrates that R.W. Docks presented the testimony of Carlos Torro, an expert on sedimentation to discuss the effects of dredging in general, and of Randy Duncan to discuss the aquatic plant community (Mr. Duncan conducted what he terms a visual survey from the shoreline, see also, Transcript at pp 113-14).

Regarding the third issue, whether dredging will positively affect the "entrophication" in the area, the court could discern no testimony offered by R.W. Docks on this issue. Neither did it appear to be a factor critical to the ALJ's decision.

Regarding the fourth issue, that the weeds in question do not constitute rare "open water" vegetation, it is clear that the testimony of the petitioner's witness, Mr. Duncan was in no way dispositive of this issue. In contract, Emmet Judziewicz and others testified that the community was uncommon in Lake Superior. (Transcript at pp. 260-261, 263). There was extensive discussion on the issue of whether or not particular species were formally designated as threatened, endangered, or of special concern, and if so, whether the designation was on a state or federal level. Numerous witnesses testified that although some of the individual species contained in the community were common to other inland lakes in Wisconsin, that the vegetative community was quite rare in Lake Superior, and was a valuable ecological resource.

R.W. Docks separately asserts that the ALJ erred by ignoring the court's directive regarding estoppel.

Pursuant to the remand order issued by Dane County Circuit Court, the DNR was also directed to "take testimony and make findings regarding its prior knowledge of petitioner's plans to dredge the area in question prior to issuing a breakwater permit and any reliance by petitioner on

Departmental representations." (Memorandum Decision and Order, Dane County Circuit Court, 86-CV-2508, p 13)

The record unequivocally demonstrates that testimony was taken and other evidence was introduced on the issue of estoppel. On behalf of R.W. Docks, Mr. Holmgren testified on the issue (see, e.g., Trans. pp. 513-522), and both R.W. Docks (Memorandum of R.W. Docks & Slips In Support of Applications, 3-NW-84-101/3-NW-95-04022, pp. 9-10) and the DNR (Department's Response Brief, 3-NW-84-101/3-NW-95-04022, pp. 6-7) briefed the issue to the ALJ.

The DNR concedes that the ALJ "did not adjudicate petitioner's estoppel argument," because, it asserts, the ALJ found that R.W. Docks has "'overstated the significance of that history to the balancing of public and private rights at the project site that the relevant legal standards require."

It is true that the petitioner faces a stiff burden in asserting a claim for estoppel. Not only must it prove the elements necessary for estoppel,[13] but it must also be able to surmount the DNR's assertion that its actions were a proper exercise of the State's police powers, against which a claim for estoppel may not be applied. State v. City of Green Bay, 96 Wis. 2d 195, 201 (1980). Nevertheless, it is not the provence of this court but of the ALJ to make such findings. Accordingly, pursuant to §227.57(7), Stats., and consistent with the prior circuit court order, this matter is remanded back to the ALJ to make the necessary findings on the issue of estoppel.

---

[13] These are: 1) action or nonaction on the part of the DNR which 2) induces reliance by R.W. Docks 3) to the detriment of R.W. Docks. State v. City of Green Bay, 96 Wis. 20, 195 (1980).

ORDER

For the reasons stated above, the court makes the following order:

Although the administrative decisions of the Department of Natural Resources denying R.W. Docks a structure permit and a contract to dredge, are support by substantial evidence in the record, and are not clearly erroneous as a matter of law, the ALJ failed to make any findings regarding estoppel. Therefore, this case is remanded to the ALJ for the narrow purpose of making findings on the issue of estoppel.

So ordered.

29th day of May 1997.

By the Court

/s/ Stuart A. Schwartz
Stuart A. Schwartz
Circuit Judge
Branch 15

BEFORE THE
DEPARTMENT OF NATURAL RESOURCES

Application of Port Industries, Inc., for a Permit to Construct a Solid Breakwater Structure on the Bed of Lake Superior, Town of Bayfield, Bayfield County	)))))	3-WR-430

FINDINGS OF FACT AND PERMIT

Port Industries, Inc., 15908 Wayzata Boulevard, Wayzata, Minnesota 55391, filed an application with the Department on December 12, 1968, for a permit under section 30.12, Statutes, to build and maintain a breakwater structure in Lake Superior, Bayfield County. Permit granted.

Pursuant to due notice, hearing was held at Washburn on March 13, 1969, before Examiner Maurice H. Van Susteren.

Appearances:

Port Industries, Inc., by

Robert F. Holmgren, vice president
Wayzata, Minnesota

Walter L. Holmgren, director
Minneapolis, Minnesota

L. D. Craig, construction superintendent
Bayfield

In Support:

Town of Bayfield, by

Walter Bainingham, town chairman
Bayfield

Carl Carlson
Waupun

As Interest May Appear:

Department of Natural Resources,
Division of Fish, Game and Enforcement, by

Lewis Posekany, chief,
biological engineering section
Madison

Of the Staff of the Division of Environmental Protection

FINDINGS OF FACT

1. Port Industries, Inc., on December 12, 1968, filed an application with the Department for a permit under section 30.12, Statutes, to construct and maintain a breakwater in Lake Superior in section 22, township 50 north, range 4 west, Town of Bayfield, Bayfield County. On February 5, 1969, a copy of the notice of hearing was mailed to the clerks of Bayfield County and the Town of Bayfield, which are the county and town wherein the proposed structure is located.

2. Port Industries, Inc., owns a tract of land described as:

> Beginning at the point on the shoreline of Shequamegon Bay of Lake Superior where the same is intersected by the north and south quarter section line of section 32, township 50 north, range 4 west; thence north along said quarter section line to its

intersection with the south line of the right-of-way of State Trunk Highway No. 13; thence southwesterly following the southerly line of said right-of-way to its intersection with the east line of government lot 3 of said section 22; thence north along the west line of government lot 3 to the south line of said section 22; thence east along the south section line of said section 22 to its intersection with the shore of Chequemegon Bay; thence northeastly following the shoreline to the point of beginning.

3. The above-described property abuts Lake Superior, which is navigable in fact.

4. The applicant proposed to construct a breakwater . . . . feet long nearly parallel with and 600 feet from the shoreline as shown in Exhibit No. 3. It will be constructed of steal ore . . . . together and filled with sand and rock, which will be supported by riprap. The top of the breakwater will be at an elevation 604.0 feet, ... Great Lakes Datum.

5. The purpose of the proposed structure is to provide a protected harbor for a marina.

6. The applicant is financially capable of constructing, maintaining, and removing the structure, if it is deemed . . . .

7. The proposed structure will not materially obstruct existing navigation and will not be detrimental to the public interest.

CONCLUSIONS OF LAW

1. The applicant, Port Industries, Inc., is a riparian owner within the meaning of section 30.12, Statutes.

2. The proposed facility described in the findings of fact constitutes a structure within the meaning of section 30.12, Statutes.

3. The Department has authority under section 30.12, Statutes, and in accordance with the foregoing findings of fact, to issue a permit for the construction and maintenance of the said structure.

PERMIT

AND THERE HEREBY DOES ISSUE AND IS GRANTED to the applicant, Port Industries, Inc., a permit under section 30.12, Statutes, for the construction of a structure as described in the foregoing findings of fact, subject, however, to the provisions that:

1. The authority herein granted can be amended or rescinded if the structure becomes a material obstruction to navigation or becomes detrimental to the public interest.

2. The permit granted herein shall expire on May 2, 1971, if the structure is not completed before such date.

3. A copy of this permit shall be kept at the site at all times during the construction of the structure.

4. The applicant shall waive any objections to the free and unlimited inspection of the premises, site, or facility at any time by any employe of the Department for the purpose of investigating the construction, operation, and maintenance of the project.

Dated at Madison, Wisconsin, May 19, 1969

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES
For the Secretary
By /s/Thomas G. Fangos

State of Wisconsin\DEPARTMENT OF NATURAL RESOURCES

L.P. Voigt
Secretary

Box 450
Madison, Wisconsin 53701

May 19, 1972

IN REPLY REFER TO: 3520-2
3530-3

3-WR-1265

Mr. J. C. Fox, U.S. Coast Guard, Chief, Ninth Coast Guard District, 1240 East 9th Street, Cleveland, Ohio 44199
Mr. Robert F. Holmgren, President, Port Industries, Inc., 400 Shelard Plaza, Mpls., Minn.
Port Industries, Inc., Box 299 A, Route 1, Bayfield, Wisconsin 54814
Port Industries, Inc., c/o Mr. Gary L. Bakke, Attorney, New Richmond, Wisconsin 54017
Mr. Jacob Heinlein, Zoning Administrator, Courthouse, Washburn, Wisconsin 54891
Mr. Arthur A. Oehmcke, Director, West Central District, Eau Claire, Wisconsin
Mr. Lester Voigt, Secretary, Department of Natural Resources, 14th Floor, Pyare Square Building, Madison, Wisconsin
Mr. J. R. Smith, Administrator, Division of Forestry, Wildlife and Recreation, Pyare Square Building, Madison, Wisconsin
Director, Bureau of Legal Services, 13th Floor, Pyare Square Building, Madison, Wisconsin
Mr. James W. Taylor, Pyare Square Building, Bureau of Information and Education, 12th Floor, Madison, Wisconsin
Mr. G. J. Barber, Soil Conservation Board, Soils Building, University of Wisconsin, Madison, Wisconsin

Mr. Walter Scott, 14th Floor, Pyare Square Building, Madison, Wisconsin
Mr. John Wyngaard, 110 East Main Street, Madison, Wisconsin 53703
Mr. Richard Kienitz, Milwaukee Journal News Bureau, Two West Mifflin Street, Madison, Wisconsin 53703
Attorney General, State Capitol, Madison, Wisconsin
Public Intervenor, Attorney General's Office, State Capitol, Madison, Wisconsin
Mr. Cyril Kabat, Scientific Areas Council, 9th Floor, Pyare Square Building, Madison, Wisconsin

Investigation on Motion of the Department of Natural Resources of an Alleged Illegal Deposit of Material on the Bed of Lake Superior and an Unlawful Removal of material from the Bed of Lake Superior in the Town of Bayfield, Bayfield County, by Port Industries, Inc.

Gentlemen:

We enclose copy of Findings of Fact, Conclusions of Law and Order issued in the above entitled matter.

Very truly yours,
Division of Environmental Protection
/s/
Thomas G. Frangos
Administrator

BEFORE THE
DEPARTMENT OF NATURAL RESOURCES

Investigation on Motion of the Department of Natural Resources of an Alleged Illegal Deposit of Material on the Bed of Lake Superior and an Unlawful Removal of Material from the Bed of Lake Superior in the Town of Bayfield, Bayfield County, by Port Industries, Inc.	)	3-WR-1265

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On April 4, 1972, the Department of Natural Resources issued a notice of investigation and hearing into the alleged illegal deposit of material on the bed of Lake Superior and the alleged illegal removal of material from the bed of Lake Superior in the Town of Bayfield, Bayfield County, by Port Industries, Inc.

Upon due notice being given, hearing was held pursuant to Section 30.03, Wisconsin Statutes, on April 18, 1972, at Spooner, Wisconsin, before Examiner Donald R. Murphy.

Appearances:

DEPARTMENT OF NATURAL RESOURCES
Division of Forestry, Wildlife & Recreation
and the
Division of Environmental Protection
by
Edward D. Main, Attorney
Madison

RESPONDENT: PORT INDUSTRIES, INC.
by
Gary L. Bakke, Attorney
New Richmond

FINDINGS OF FACT

THE DEPARTMENT FINDS:

1. At the hearing, a stipulation was entered into between the Department of Natural Resources, Divisions of Forestry, Wildlife & Recreation and Environmental Protection and the respondent, Port Industries, Inc. which provides:

"1. That Port Industries, Inc. is the owner of property located in the southeast quarter, southwest quarter, section 22, township 50 north, range 4 west, Town of Bayfield, Bayfield County, Wisconsin.

2. That during the 1971 construction season a contractor acting as an agent for Port Industries, Inc. removed material and deposited material on the bed of Lake Superior.

3. That Lake Superior is navigable in fact.

4. That no permits for the deposit on and removal of materials from the bed of Lake Superior were granted to Port Industries, Inc. by the Department of Natural Resources pursuant to Chapter 30, Wisconsin Statutes.

5. That said construction activities involving the bed of Lake Superior were done in violation of Section 30.20 and 30.12, Wisconsin Statutes. Under Section 30.15, Wisconsin Statutes, every violation of Section 30.12 constitutes an obstruction of navigable waters, and each day during which the obstruction exists is a separate offense which may result

in a forfeiture of $50.00 per day. A violation of Section 30.20 of the Wisconsin Statutes may result in a forfeiture of not more than $1,000.00.

6. That Port Industries, Inc. agrees to pay to the State of Wisconsin forthwith a forfeiture of $1,000.00 pursuant to subsection 30.20 (1) (c), Wisconsin Statutes, and subsections 30.15 (1) (d) and 30.15 (3), Wisconsin Statutes.

7. That this stipulation is authorized by Section 227.07, Wisconsin Statutes, and the forfeiture shall be deposited with the state treasurer in accordance with Section 30.03, Wisconsin Statutes.

8. That the Department of Natural Resources will issue an order based upon this stipulation, thereby precluding the Division of Environmental Protection and the Division of Forestry, Wildlife and Recreation of the Department of Natural Resources from any further action to obtain forfeitures in this matter upon payment of the stipulated forfeiture. The Department shall not, however, be precluded from reopening this proceeding upon complaint of said divisions if the necessary permits are not obtained to legalize the already completed construction, as well as any future construction nor shall the Department of Natural Resources be precluded from reopening this proceeding if existing violations of Chapter 30 are not abated to the satisfaction of said divisions of the Department of Natural Resources."

2. Formal application has been made by Port Industries, Inc. to the Department of Natural Resources for the necessary permits under Chapter 30, Wisconsin Statutes.

3. Prior to the conclusion of the hearing, Port Industries, Inc. deposited with the hearing examiner a check in the amount of $1,000.00, payable to the State of Wisconsin Department of Natural Resources.

4. The above-described payment is adequate consideration for dismissal of this matter.

CONCLUSIONS OF LAW

1. Section 227.07, Wisconsin Statutes, states, "Prior to the final disposition of any contested case, all parties shall be afforded opportunity for full, fair public hearing after reasonable notice, but this shall not preclude the informal disposition of controversies by stipulation, agreed settlement, consent order, or default."

2. The Department of Natural Resources has authority to dismiss the proceedings herin, and an order should be issued dismissing the action.

ORDER

IT IS THEREFORE ORDERED that the proceedings herein be and hereby are dismissed with prejudice.

Dated at Madison, Wisconsin, May 19, 1972

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES
For the Secretary

By /s/
Thomas G. Frangos, Administrator
Division of Environmental Pro

DEPARTMENT OF NATURAL RESOURCES
PERMIT MAILING LIST

COPIES SENT TO:

Department of Natural Resources Personnel:
Water Management Supervisor-NWD, Spooner

U.S. Army Corps of Engineers:
Ben Wopat, Chief, Regulatory Branch, 190 Fifth Street East, St. Paul, MN 55101-1638

Applicant:
Mr. Robert Holmgren, Managing Agent, R.W. Docks & Slips, 18855 Ridgewood Rd., Wayzata, MN 55391

Agent:
Mr. Bruce Rasmussen, Rasmussen, Duckson & Carlson, Ltd., 2116 Second Ave South, Minneapolis, MN 55404

Zoning Administrator:
Richard Spotts, Bayfield County Courthouse, 117 East 5th Street, Washburn, WI 54891

Town Clerk:
Jane Hauser, P. O. Box 652, Bayfield, WI 54814

Adjacent Landowners:
John Maloney, 4400 Curve Ave, Edina, MN 55424

Bob DeChantel, Condo 511, Port Superior Village, Bayfield, WI 54814-0277

Port Superior Village Association, c/o Ann Locey, President, 168 E. 6th, Apt. 4202, St.Paul, MN 55101

Port Superior Marina Association, c/o Phil Peterson, Operations Manager, Rt 1 Box 717, Bayfield, WI 54814

Surveillance Officer:

Mike Vogelsang, DNR, Box 589, 141 S. 3rd Street, Bayfield, WI 54814

Original and copies of this document were deposited for mailing to the addressee and indicated copies in the US mail at Brule, WI,
on 7/3/95 by /s/

State of Wisconsin
DEPARTMENT OF NATURAL RESOURCES
BRULE AREA HEADQUARTERS
P.O. Box 128
Ranger Station Road
Brule, Wisconsin 54820
TELEPHONE 715-372-4866
TELEFAX 715-372-4836

June 29, 1995

3500
3-NW-1995-04010

Mr. Robert Holmgren
R.W. Docks & Slips
18855 Ridgewood Rd.
Wayzata, MN 55391

Dear Mr. Holmgren:

We have reviewed your application for a permit to construct an extension to Dock 4 in the Port Superior Marina, Bayfield County. You will be pleased to know your application is approved with a few limitations.

Attached are two copies of your permit which lists the conditions that must be followed. In addition, I have included a copy of our findings of fact and conclusions of law and your rights to appeal our action. One copy of the permit is for your records and the other is to be kept for reference at the project site. Please read the permit conditions carefully so that you are fully aware of what is expected of you. Conditions number 2 through 5 are especially important. Condition number one requires that you notify Conservation Warden Mike Vogelsang before starting construction and again after your project is completed.

Please note that your extension of dock 4 is limited to 44 feet from the existing dock. After lengthy discussions with all

involved parties over this application, the Department determined that this length of dock, in combination with a wood piling anchor for stability, would provide you with your two additional boat slips without the need for a time-consuming and costly hearing procedure. This dock structure and configuration is also consistent with the other docks within the Port Superior Marina.

If you have any questions about your permit, please feel free to call me at 715-372-4866. And remember, your permit is not valid until you notify Mr. Vogelsang of your intention to begin construction.

Sincerely,

/s/

Duane J. Lahti
Water Management Specialist

Attach.

cc: Bruce Rasmussen
Michael Cain - LC/5

STATE OF WISCONSIN
DEPARTMENT OF NATURAL
RESOURCES

DOCK PERMIT
3-NW-1995-04010

R.W. Docks & Slips is hereby granted under Section 30.12, Wisconsin Statutes, a permit to construct a floating dock extension on the bed of Lake Superior, located in Government Lot 03 of Section 22, T50N, RO4W, Bayfield County, subject to the following conditions:

1. The permittee shall notify conservation Warden Mike Vogelsang, DNR, Box 589, 141 S 3rd Street, Bayfield, Wisconsin, 54814 or he can be called at 715-779-3780 before starting construction and again not more than 5 days after the project is complete.

2. This permit authorizes the construction and placement of a floating dock extension 44 feet in length and 8 feet in width with one fingerpier 4 feet in width and 32 feet in length extending off the easterly side of Dock 4 creating two boat slips. The pier will be constructed of treated wood decking and stringers supported by a foam-filled polyethylene float system and anchored with wood pilings for stability.

3. The maximum length of the main dock extension shall be specifically limited to 44 feet from the existing dock. Oak wood piling shall be used for stability at the end of the pier.

4. Any upland areas that are disturbed during construction shall be stabilized as necessary to prevent sedimentation of the waterway.

5. Flotation materials shall be free of chemicals and other deleterious residues or substances.

6. This permit expires on November 1, 1996 if the project is not completed before then. No construction may begin or continue after this date unless a new permit or permit extension is granted in writing by the Department.

7. This permit does not authorize any work other than what you specifically describe in the application and plans, and as limited by conditions of this permit. No changes in the project or plans may be made without prior written approval of the Department. The dock shall be constructed according to the plans shown as Attachment 1.

8. The permittee is responsible for obtaining any permit or approval required by municipal, town or county zoning ordinances or by the U.S. Army Corps of Engineers before starting the project.

9. The permittee shall allow free and unlimited access to the project site at any time to any Department employee who is investigating the project's construction, operation or maintenance.

10. The Department may change or revoke this permit if the project obstructs navigation or becomes detrimental to the public interest.

11. A copy of this permit shall be kept at the project site at all times until the project has been completed.

12. Acceptance of this permit and beginning the project means that you have read, understand and agree to follow all conditions of this permit.

Dated at Brule, WI June 29, 1995

STATE OF WISCONSIN DEPARTMENT OF
NATURAL RESOURCES
For the Secretary

By /s/
Duane J. Lahti
Water Management Specialist
NWD - Brule

FINDINGS OF FACT (Facts which were considered in making this decision.)

1. R.W. Docks & Slips has completed filing an application for a permit to construct a floating dock extension on the bed of Lake Superior located in Government Lot 03 of Section 22, T50N, R04W, Bayfield County.

2. The project will consist of construction of a floating dock extension 44 feet in length and 8 feet in width with one fingerpier 4 feet in width and 32 feet in length extending off the easterly side of Dock 4 creating two boat slips. The pier will be constructed of treated wood decking and stringers supported by a foam-filled polyethylene float system. The pier will be anchored with wood pilings.

3. The applicant, on March 23, 1995 filed an application for a permit to extend Dock 4 by 48 feet with one finger pier on the easterly side of Dock 4 creating slips 197 and 199.

4. On May 23, 1995 Port Superior Marina Association (PSMA) filed a timely letter of objection stating the

opposition to the 48 foot extension due to inconsistency with other docks in the marina and intrusion into the navigation channel. There was no objection to the 44 foot extension.

5. On May 26, 1995 the applicant, R.W. Docks & Slips filed a response and rebuttal to the May 23 letter from PSMA requesting that the permit be issued for the 48 foot dock extension without hearing.

6. One June 9, 1995, a site inspection was conducted by the Brule Area DNR Water Management Specialist at Port Superior Marina with Mr. Robert Holmgren of R.W. Docks & Slips and Mr. Phil Peterson of Port Superior Marina Association present.

7. After the site inspection and discussions with both parties, the Department has determined that it is in the best interest of all parties and the public to issue the permit for a 44 foot long dock extension with one finger pier 32 feet in length as stated in Finding of Fact 2. A wooden piling can be used to stabilize the dock which is consistent with the other existing docks in Port Superior Marina.

8. The Department has completed an investigation of the project site and has evaluated the project as described in the application and plans.

9. The proposed project will not impact wetlands.

10. The Department and the applicant have completed all procedural requirements and the project as permitted will comply with all applicable requirements of Section 30.12, Wisconsin Statutes, and NR 102, 103, 115, 116, and NR 150 Wisconsin Administrative Code.

11. The Department has determined that the grant or denial of this permit would not be a major state action significantly affecting the quality of the human environment.

CONCLUSIONS OF LAW (Legal reasons why the Department can issue permits.)

1. The Department has authority under the above indicated Statutes and Administrative Rules, to issue a permit for the construction and maintenance of this project.
2. The Department has complied with Section 1.11, Wisconsin Statutes.

NOTICE OF APPEAL RIGHTS

If you believe that you have a right to challenge this decision, you should know that Wisconsin Statutes and Administrative Rules establish time periods within which requests to review Department decisions must be filed.

For judicial review of a decision pursuant to Sections 227.52 and 227.53, Wisconsin Statutes, you have 30 days after the decision is mailed, or otherwise served by the Department, to file your petition on the Department. Such a petition for judicial review shall name the Department of Natural Resources as the respondent.

To request a contested case hearing pursuant to Section 227.42, Wisconsin Statutes, you have 30 days after the decision is mailed, or otherwise served by the Department, to serve a petition for a hearing on the Secretary of the Department of Natural Resources. The filing of a request for a contested case hearing is not a prerequisite for judicial review and does not extend the 30-day period for filing a petition for judicial review.

This notice is provided pursuant to Section 227.48(2), Wisconsin Statutes. This decision was mailed on the date indicated on the mailing list.

State of Wisconsin
DEPARTMENT OF NATURAL RESOURCES
Box 450
Madison, Wisconsin 53701

L.P. Voigt
Secretary

December 30, 1968

Robert F. Holmgren, Vice President
Port Industries, Inc.
15908 Wayzata Boulevard
Wayzata, Minnesota 55391

Re: Contract for the Removal of Material from Navigable Waters

Dear Mr. Holmgren:

We are enclosing the original of contract 3-WR-138.45 authorizing Port Industries, Inc., to dredge materials from the bed of Lake Superior, Bayfield County. It requires signature and is to be returned to this office immediately.

We are also enclosing two copies of a form of bond which meets the Department's requirements. Only one copy need be filed with the Department. It is our thought that the surety company may wish to retain the extra copy for its file.

A payment of $225.00 is due at this time for the estimated 20,000 cubic yards of material to be removed.

When we receive the signed contract, an acceptable bond, and the remittance, copies of the contract will be sent to you. The contract will then be in force.

Your attention is called to the fact that you must also obtain authorization for this work from the U.S. Army Corps of Engineers.

Further, the granting of this dredging contract is not to be construed as an assurance that the application for a structure at this location will be granted.

Very truly yours,
Division of Environmental Protection

/s/
Gerald P. Wallin, Acting Chief
Water Regulation Section

GPW:mwl
Encl.
cc: Bureau of Engineering
Corps of Engineers

3. The applicant proposes to construct a solid earth filled structure 220 feet long and 90 feet wide placed behind a timber wall, as shown in the application.

4. The purpose of the proposed structure is to create a harbor for the mooring of boats.

5. The applicant is financially capable of constructing, maintaining, or removing the structure if it should be found necessary to do so.

6. The proposed structure will not materially obstruct existing navigation or reduce the effective flood flow capacity of a stream, and will not be detrimental to the public interest.

7. The proposed structure will not adversely affect water quality nor will it increase water pollution in Lake Superior.

CONCLUSIONS OF LAW

1. The applicant is a riparian owner within the meaning of section 30.12, Statutes.

2. The proposed facility described in the findings of fact constitutes a structure within the meaning of section 30.12, Statutes, and in accordance with the foregoing findings of fact, to issue a permit for the construction and maintenance of the said structure.

PERMIT

AND THERE HEREBY DOES ISSUE AND IS GRANTED to the applicant, a permit under section 30.12, Statutes, for the construction of a structure as described in the foregoing findings of fact, subject, however, to the conditions that:

1. The authority hereby granted can be amended or rescinded if the structure becomes a material obstruction to navigation or becomes detrimental to the public interest.

2. The applicant shall waive any objection to the free and unlimited inspection of the premises, site, or facility at any time by any

STATE OF WISCONSIN BAYFIELD COUNTY
CIRCUIT COURT

R.W. DOCKS & SLIPS,

Plaintiff,

v. Case No. 990-CV-1

STATE OF WISCONSIN and
WISCONSIN DEPARTMENT OF
NATURAL RESOURCES,

Defendants.

SECOND SUPPLEMENTAL AFFIDAVIT OF ROBERT F. HOLMGREN

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Robert F. Holmgren, being duly sworn and on his oath, deposes and says of his own personal knowledge:

1. I am the managing agent of plaintiff and have been since the inception of the Pike's Bay Marine project in Bayfield County, Wisconsin in 1968.

2. Plaintiff is not in the business of operating the Port Superior Marina. The operation of the marina is the purview of the condominium association.

3. Two hundred one of plaintiff's condominium slips/units have been sold and they are freely transferable

from one owner to another. The owner of a condominium unit has a right to exclude others from his unit.

4. I have carefully reviewed plaintiff's construction records and have calculated that the approximate present value of the improvements are:

Slips	$1,005,000
Breakwater	1,000,000
Seawall	500,000
Dredging	400,000
Clubhouse	450,000
Restaurant and Offices	450,000
Shop and Equipment	200,000
Store	50,000
Heads and Showers	25,000
Movilla	40,000
Crane	70,000
Fueling Center	40,000
Service Dock	25,000
Sewer	50,000
Water Wells	18,000
Tennis Courts	50,000
Storage and Parking Areas	700,000
Blacktop	80,000
Swimming Pool	100,000
Quay	200,000
Real Estate	2,000,00
Perpendicular Breakwall	240,000
Legal Fees	307,000
	$8,000,000

5. I have carefully reviewed my client's sales records and have determined that the approximate average sale price for the 201 condominium boat slips/units sold is $10,000.

5. From the foregoing, I conclude that plaintiff expenditures for marina improvements exceeded plaintiff's revenue from condominium sales by over $1,000,000,.

Further affiant sayeth naught save that he gives this affidavit in opposition to defendants' motion for summary judgment.

/s/
Robert F. Holmgren

Subscribed and sworn to before me
this 19th day of August, 1999.

/s/Lee A. Sanford
Notary Public

Supreme Court, U.S.
FILED
OCT 26 2001
CLERK

(3)

No. 01-520

In the

Supreme Court of the United States

R.W. DOCKS & SLIPS,

Petitioners,

v.

STATE OF WISCONSIN AND WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Respondents.

On Petition for Writ of Certiorari to The Supreme Court of Wisconsin

BRIEF *AMICUS CURIAE* OF DEFENDERS OF PROPERTY RIGHTS IN SUPPORT OF PETITIONER

Nancie G. Marzulla
DEFENDERS OF PROPERTY RIGHTS
1350 Connecticut Ave., NW
Suite 410
Washington, DC 20036
(202) 822-6770

Counsel of Record for *Amicus Curiae*

17 pp

QUESTIONS PRESENTED

Amicus Curiae will address the following questions:

Whether the public trust doctrine is an absolute defense for a state, thereby preventing it from ever having to pay compensation under the Fifth Amendment?

Whether the 71 boat slips should be treated as individual properties for the purposes of determining the economic impact on the property owner?

TABLE OF CONTENTS

QUESTION PRESENTED.....i

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iii

INTERESTS OF *AMICUS CURIAE*.....2

STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT.....3

REASONS FOR GRANTING THE WRIT.....5

I. THE ISSUE OF WHETHER THE PUBLIC TRUST DOCTRINE SERVES AS AN ABSOLUTE DEFENSE FOR THE STATE, ABSOLVING IT OF ANY RESPONSIBILITY UNDER THE JUST COMPENSATION CLAUSE.....5

II. THE LOWER COURTS OF APPEAL AND STATE COURTS AND STATE COURTS NEED GUIDANCE FROM THIS COURT ON THE RELEVANT PARCEL ISSUE.....10

CONCLUSION.....13

TABLE OF AUTHORITIES

CASES

Armstrong v. United States, 364 U.S. 40 (1960).....6

Kaiser Aetna v. United States, 444 U.S. 164 (1979).....8, 9

Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470 (1987).....12

Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir.1994).....11, 12

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).....7, 8, 11, 13

Muench v. Pub. Serv. Comm'n, 53 N.W.2d 514 (Wis. 1952).....5, 6

Olson v. Merrill, 42 Wis. 203 (1877).....5

Palazzolo v. Rhode Island, 121 S. Ct. 2448 (2001).....9, 10, 12, 13

Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978).....6, 7, 8, 10

R.W. Docks & Slips v. Wisconsin, 628 N.W.2d 781 (Wis. 2001.....3, 4, 8, 9, 10, 11

CONSTITUTIONS

WIS CONST. art. IX, § 1.....5

No. 01-520

In the

Supreme Court of the United States

R.W. DOCKS & SLIPS,

Petitioners,

v.

STATE OF WISCONSIN AND WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Respondents.

On Petition for Writ of Certiorari to The Supreme Court of Wisconsin

BRIEF *AMICUS CURIAE* OF DEFENDERS OF PROPERTY RIGHTS IN SUPPORT OF PETITIONER

Pursuant to Rule 37.3 of the Rules of this Court, *amicus curiae* submits this brief in support of petitioner.[1] Both parties have consented to the filing of this brief.

[1] No counsel for either party authored this brief *amicus curiae*, either in whole or in part. Furthermore, no persons other than *amicus curiae* contributed financially to the preparation of this brief.

INTERESTS OF AMICUS CURIAE

Defenders of Property Rights is the only national legal defense foundation dedicated exclusively to protecting private property rights. Based in Washington, D.C., Defenders was founded as a non-profit, public interest legal foundation in 1991. Its mission is to protect vigorously those rights considered essential by the Framers of the Constitution, and to promote a better understanding of the relationship between private property rights and individual liberty.

Defenders of Property Rights engages in litigation across the country on behalf of its members and the public interest to prevent government incursion into protections guaranteed by the Bill of Rights. Defenders participated in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Keene Corp. v. United States*, 508 U.S. 200 (1993); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Bennett v. Spear*, 520 U.S. 154 (1997); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); and, *Palazzolo v. Rhode Island*, 121 S. Ct. 2448 (2001).

STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

R.W. Docks ("Docks") is a general partnership that owns 1,100 feet of frontage along lake Superior in Bayfield, Wisconsin. *R.W. Docks & Slips v. Wisconsin*, 628 N.W.2d 781, 784 (Wis. 2001). In 1969, Docks sought and received approval from the Wisconsin Department of Natural Resources (DNR) and the Army Corp of Engineers to construct a breakwater and boat harbor in connection with the development of a marina. *Id.* at 784. Docks proceeded to continue building the marina over the next eight years, constructing the breakwater, docks containing 201 boat slips, a sea wall, a lagoon, a port, and several recreational facilities on land. *Id.* All the while, Docks was given the necessary permits from DNR and the Corps. *Id.*

In 1977, Docks converted the marina into condominiums, selling each of the 201 slips as a separate piece of property. *Id.* At this time, the development of the marina was not complete, as there were still 71 slips awaiting permit approval and construction. *Id.* at 785. In 1986 the DNR denied the dredging permit necessary to build the final 71 slips. *Id.* The permit was denied because of the environmental consequences that would ensue for a small weedbed that had developed as a result of the protection

provided by a breakwater built by Docks. *Id.* Docks exhausted its administrative remedies and sued the DNR in circuit court alleging an unconstitutional taking. *Id.*

The circuit court granted DNR's motion for summary judgment, holding that Docks did not have a recognizable interest in the undeveloped 71 slips, that there could be no taking because the land was subject to the public trust doctrine, and that there was no taking because Docks retained considerable use of the parcel as a whole. *Id.* The court of appeals affirmed only the last issue, holding that there was no taking since Docks still enjoyed the use of the completed 201 slips. *Id.* The court of appeals did not address the other issues. *Id.* The Wisconsin Supreme Court accepted review and affirmed the lower court's ruling, holding that there was no taking because (1) the land was subject to the public trust doctrine, (2) there was no recovery available for a partial regulatory taking in Wisconsin, and (3) even if there could be recovery for a partial taking, the economic impact on Docks was minimal when viewed against the value of the parcel as a whole. *Id.* at 791.

REASONS FOR GRANTING THE WRIT

I. THE ISSUE OF WHETHER THE PUBLIC TRUST DOCTRINE SERVES AS AN ABSOLUTE DEFENSE FOR THE STATE, ABSOLVING IT OF ANY RESPONSIBILITY UNDER THE JUST COMPENSATION CLAUSE

The public trust doctrine dates back to the Northwest Ordinance of 1787, which was originally designed to ensure that navigable waters "shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost, or duty therefore." WIS. CONST. art. IX, § 1. The fact that the doctrine was originally intended to protect navigation rights is evidenced by the use of the saw-log test, a method whereby navigability was determined by whether a stream, during even part of the year, could be used to float logs to the market. *Olson v. Merrill*, 42 Wis. 203, 212 (1877). The doctrine has in recent years been expanded to include protection of recreational uses, including fishing, hunting, and boating. *Muench v. Pub. Serv. Comm'n*, 53 N.W.2d 514, 518-20 (Wis. 1952).

In this case, the trial court first determined that the denial of the dredging permit in this case "implicated only Docks' riparian rights, which are subject to the public trust doctrine." *Id.* at 789. The court went on to note that since the only rights affected were subject to the public trust

doctrine, "Docks has failed to demonstrate a compensable regulatory taking." *Id.* The court reasoned, "[i]f Docks had no private property right to place boat slips on the lakebed at the marina, it cannot have suffered an unconstitutional taking." *Id.* at 787. Thus, under the decision below, once a court determines that a piece of property is subject to the public trust doctrine, no partial or categorical taking could occur because the owner had no right to the property in the first place. This hard and fast rule ignores this Court's precedent to the contrary, and is therefore worthy of consideration.

This Court has consistently held that the purpose of the Just Compensation Clause is to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Given the complexities inherent in this type of analysis, the Court has been unwilling to impose stringent per se rules, instead recognizing that "whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case.'" *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (citation omitted) (brackets in original).

Wisconsin attempts to justify its *per se* rule by noting that the public trust doctrine "is established 'by judicial authority so long acquiesced in as to become a rule of property.'" *R.W. Docks*, 628 N.W.2d at 788 (citation omitted). However, whether property is subject to the public trust doctrine should at least be a consideration in any takings analysis.

In fact, both the categorical and the partial takings analysis' handed down by this Court compel such a consideration. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) holds that a state has a defense to a categorical takings claim if its limitations "inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id.* at 1029. Similarly, a *Penn Central* partial takings analysis requires the consideration of the "distinct investment-backed expectations" of the landowner. *Penn Central Transp. Co.*, 438 U.S. at 124.

Moreover, as was noted previously, the public trust doctrine has emerged considerably over the years from its original purpose, which was to protect the right of all people to freely navigate our country's waterways. The doctrine today has been expansively interpreted to protect "recreational purposes such as boating, swimming, fishing, hunting, recreation, and to preserve scenic beauty." *R.W.*

Docks, 628 N.W.2d at 788. Given the transformation of the doctrine beyond its original intent, there simply has to be the possibility for an individual, fact-based analysis.

For example, there would be a distinction made between an obstruction across a waterway that inhibits navigation and a proposed dock that might jeopardize a small, underwater weedbed that only grew as a result of a breakwater the developer had built during the initial stages of a state-approved project. *Id.* at 784. Courts must be allowed to distinguish between situations that strike at the heart of the public trust doctrine and those that rest on the periphery, especially in the fact-driven world of takings analysis.

However, under the decision of the court below, no possibility for a different analysis exists. Once the court has determined that the public trust doctrine applies, no further consideration of the factual circumstances particular to that case would be permitted, contrary to this Court's mandate in *Lucas* and *Penn Central*. *See Lucas,* 505 U.S. at 1028-29; *Penn Central Transp. Co.*, 438 U.S. at 123-24.

Under this Court's precedent, even a finding that the factual situation involved the existence of the navigational servitude which gave rise to the public trust doctrine would not be an automatic bar to recovery. In *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), this Court held that the public's right to access a navigable waterway of the United

States and the consideration of whether enforcement of that right amounted to a private taking were two entirely different questions. *Id.* at 174-75. The Court stated that factors specific to the case made it such that "the Government's attempt to create a public right of access to the improved pond goes so far beyond ordinary regulation or improvement for navigation as to amount to a taking." *Id.* at 178. Thus, even in a situation involving the analytical base of the public trust doctrine, the government could be required under the Fifth Amendment to compensate the landowner for the taking. *Id.* at 179-80. The Wisconsin Supreme Court's rule to the contrary, holding that compensation would never be appropriate when the public trust doctrine has been implicated, regardless of the public interest involved, cannot be reconciled.

The court below emphasized that the public trust doctrine has existed for a considerable length of time, to the point that "[i]t is part of the organic law of the state." *R.W. Docks*, 628 N.W.2d at 788 (citation omitted). However, the recognition that a possible restriction on a piece of land predated the acquisition of the parcel cannot by itself be dispositive. Just last term, in *Palazzolo v. Rhode Island*, 121 S. Ct. 2448 (2001), the Court rejected the notion that "[a] purchaser or a successive title holder . . . is deemed to have notice of an earlier-enacted restriction and is barred from

claiming that it effects a taking." *Id.* at 2462. The Court went on to note that just because a law or doctrine is old does not mean that a taking is automatically barred, holding that "[f]uture generations, too, have a right to challenge unreasonable limitations on the use and value of land." *Id.* at 2463. The holding below cannot be reconciled with this Court's precedent, and it is therefore worthy of review.

II. THE LOWER COURTS OF APPEAL AND STATE COURTS AND STATE COURTS NEED GUIDANCE FROM THIS COURT ON THE RELEVANT PARCEL ISSUE

After deciding that the public trust doctrine served as an absolute defense for the state, thereby preventing any recovery for the property owner, the court below nevertheless went on to conduct a three-step *Penn Central* analysis. *See R.W. Docks*, 628 N.W.2d at 790-91. In the course of considering the *Penn Central* factors, the court evaluated the economic impact of the taking based on the entire parcel of land, as opposed to only looking at the portion actually subject to the state regulations, and denied recovery on the grounds that the owner had not been deprived of all or substantially all practical uses of the property. *Id.* at 790.

The court below's failure to recognize the possibility of recovery in situations where something less than the entire parcel is affected is clearly contradicted by this Court's

decisions in *Lucas*. *See Lucas*, 505 U.S. at 1019, n.8. In *Lucas*, Justice Scalia explicitly stated that a property owner who suffered something less than the complete deprivation of all economic value in his property would still be able to pursue a partial takings claim pursuant to the *Penn Central* analysis. *See id.* The holding below cannot be reconciled with this mandate.

The final reason offered for denying recovery, the lack of economic impact, is equally worthy of this Court's consideration. Throughout its opinion, the court below evaluated the economic impact based on the parcel as a whole, rather than by considering the 71 distinct condominium units that were affected. The court used this method of division for both the categorical takings analysis and the partial takings analysis. *See R.W. Docks*, 628 N.W.2d at 784, 790-91. The court held that based on its reading of state and federal caselaw, the economic impact of a regulation must always be considered in light of its effect on the parcel as a whole. *See id.* at 789-90. In so holding, the court declined an offer to follow the reasoning used by the Federal Circuit Court of Appeals in *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994). This issue, addressed by many lower courts, has been phrased the "denominator" problem:

> Because our test for regulatory takings requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property "whose value is to furnish the denominator of the fraction."

Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 497 (1987) (citation omitted).

In *Loveladies Harbor*, the Federal Circuit addressed the denominator problem by adopting "a flexible approach, designed to account for factual nuances." *Loveladies Harbor*, 28 F.3d at 1181.

In this case, where the Wisconsin Supreme Court held it inappropriate to consider any portion of a parcel less than the whole, provides the Court the opportunity to address the denominator problem not raised in *Palazzolo*. *See Palazzolo*, 121 S. Ct. 2448, 2465 (recognizing possible disagreement between this Court's precedent on the issue, but declining to address a problem that had not been presented in the petition for certiorari). The issue has been argued throughout the procedural history of this case, is presented in the petition for certiorari, and is deserving of the Court's resolution.

CONCLUSION

This case presents the Court with an opportunity to correct a confusing and oftentimes contradictory opinion facing numerous circuit courts of appeal and state courts. It provides an opportunity for this Court to further clarify what will constitute a background principle of state property law for the purposes of a *Lucas* analysis while at the same time determining what role the public trust doctrine should play in evaluating both categorical and partial regulatory takings. Additionally, the Court now has a chance to decide the difficult and elusive denominator problem that it was unable to address in *Lucas* and *Palazzolo*. Given the importance of these issues, and the variety of approaches being used in lower courts, it is incumbent upon this Court to resolve the questions presented.

Respectfully submitted,

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